Supreme Court, U.S.
FILED

97 916 DEC - 2 1997

No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

LESLIE ABROMSON, et al.,

Petitioners,

vs.

AMERICAN PACIFIC CORPORATION, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WILLIAM H. STODDARD
G. MARK ALBRIGHT
ALBRIGHT, STODDARD,
WARNICK & ALBRIGHT
801 South Rancho Drive
Las Vegas, Nevada 89106
(702) 384-7111

ROBERT S. SCHACHTER
Counsel of Record
DAN DRACHLER
OREN S. GISKAN
ZWERLING, SCHACHTER
& ZWERLING, LLP
767 Third Avenue
New York, New York 10017-2023
(212) 223-3900

SHELDON L. ALBERT
BARRACK, RODOS & BACINE
2001 Market Street
Philadelphia, Pennsylvania 19103
(215) 963-0600

Attorneys for Petitioners

65pp

QUESTIONS PRESENTED

1. Under the Court's interpretation of Rule 56 of the Federal Rules of Civil Procedure as set forth in *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242 (1986), to what extent may a lower court weigh the evidence in determining the element of materiality in a securities fraud action?

2. Whether under Rule 56 of the Federal Rules of Civil Procedure and this Court's decision in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), a lower court can grant summary judgment in a securities fraud action on the issue of materiality when upon disclosure to the public of previously undisclosed information, the market price of the security at issue drops over 25% in response to the disclosure?

3. Whether the Ninth Circuit's application of the probability/ magnitude test set forth in *Basic, Inc. v. Levinson*, 485 U.S. 224, 232 (1988), places it in direct conflict with the Seventh Circuit's holding in *Pommer v. Medtest Corp.*, 961 F.2d 620 (7th Cir. 1992)?

LIST OF PARTIES

Petitioners/Plaintiffs are class representatives Leslie A. Abromson, Ronald J. Angelo, Louis Camardella, Eli Ballan, Elie de Comminges, and Sandra Kolker. Respondents/ Defendants are American Pacific Corporation, Fred D. Gibson, C. Keith Rooker, W. J. Carroll, David N. Keys, John R. Gibson, Thomas J. War, Thomas A. Turner, Norval F. Pohl, and Victor M. Rosenzweig.

The following is furnished in compliance with Supreme Court Rule 29.1:

American Pacific Corporation

Parent Company - none

Subsidiaries - American Azide Corp.
Ampac Development Co.
Ampac Development Company of Utah
Ampac Technologies Corp.
Halotron, Inc.
Pacific Engineering & Production Co. Of Nevada
Pepcon Production, Inc.
Pepcon Systems, Inc.
Western Electrochemical Co.
Ampac Farms, Inc.
Ampac Chemicals Corp.
Sun Country Homes, Inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	iii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	8
Summary	8
I. THE NINTH CIRCUIT EXCEEDED ITS AUTHORITY UNDER RULE 56 AND *ANDERSON v. LIBERTY LOBBY* BY WEIGHING THE EVIDENCE IN THE RECORD BEFORE IT	10
II. THE NINTH CIRCUIT IMPROPERLY IGNORED THE MARKET REACTION TO THE DISCLOSURE OF THE DISPUTE BETWEEN AMPAC AND THIOKOL	12
III. THE NINTH CIRCUIT'S APPLICATION OF THE PROBABILITY/MAGNITUDE TEST SET FORTH BY THIS COURT IN *BASIC* PUTS IT IN DIRECT CONFLICT WITH THE LAW OF OTHER CIRCUITS	16
CONCLUSION	18

Page

APPENDIX

Order Denying Petition for Rehearing and Rejecting Suggestion for Rehearing En Banc (dated September 3, 1997) A-1

Opinion of the United States Court of Appeals for the Ninth Circuit (dated June 5, 1997) A-3

Decision and Order of the United States District Court for the District of Nevada (dated November 27, 1995) A-19

Judgment of the United States District Court for the District of Nevada (dated January 22, 1996) A-39

TABLE OF AUTHORITIES

Cases:	**Page(s)**
Abromson v. American Pacific Corp., 114 F.3d 898 (9th Cir.1997)	*passim*
Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128 (1972)	14
Anderson v. Liberty Lobby, Inc. 477 U.S. 242 (1986)	*passim*
Basic, Inc. v. Levinson, 485 U.S. 224 (1988)	*passim*
Mott v. R.G. Dickinson and Co., [1993-1994 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶98,034 (D. Kan. Aug. 13, 1993)	13
Pommer v. Medtest Corp., 961 F.2d 620 (7th Cir. 1992)	i,9,16,17
Shaw v. Digital Equipment Corp., 82 F.3d 1194 (1st Cir. 1996)	13
TSC Industries v. Northway, 426 U.S. 438 (1976)	12
Statutes:	
Code of Federal Regulations	
17 C.F.R. § 240.10b-5	2
Federal Rules of Civil Procedure	
Rule 23 (a)	4
Rule 23 (b)(3)	4
Rule 56(c)	4,9,10
United States Code	
15 U.S.C. § 77k	3, 5
15 U.S.C. § 77o	4, 5
155 U.S.C. § 77v	5
15 U.S.C. § 78j(b)	2, 5
15 U.S.C. § 78t	3, 5
15 U.S.C. § 78aa	5

	Page
28 U.S.C. §1254	2
28 U.S.C. §1331	5

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

LESLIE ABROMSON, et al.,

Petitioners,

vs.

AMERICAN PACIFIC CORPORATION, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Leslie A. Abromson, Ronald J. Angelo, Louis Camardella, Eli Ballan, Elie de Comminges and Sandra Kolker (the "Petitioners") individually and on behalf of the class certified by the District Court, respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 5, 1997.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Abromson v. American Pacific Corp.*, 114 F.3d 898 (9th Cir. 1997). The decision of the United States District Court for the District of Nevada (dated November 27, 1995) is unreported. App. A-19 - A-38.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on June 5, 1997. The Petition for Rehearing and Suggestion of Rehearing En Banc was denied on September 3, 1997. The jurisdiction of this Court to review that judgment by writ of certiorari is invoked under 28 U.S.C. §1254.

STATUTES AND REGULATIONS INVOLVED

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b), provides in relevant part that:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails or of any facility of any national securities exchange
>
> * * *
>
> (b) to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contradiction of such rules and regulations as the commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-5, 17 C.F.R. §240.10b-5, provides, in relevant part, that:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,
>
> (1) to employ any device, scheme, or artifice to defraud,
>
> (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in

> the light of circumstances under which they were made, not misleading, or
>
> (3) to engage in any act, practice, or course of business which operates or would operate as a fraud of deceit upon any person, in connection with the purchase or sale of any security.

Section 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78t provides in relevant part:

> Every person who, directly or indirectly, controls any person liable under any provision of this title or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

Section 11 of the Securities Act of 1933, 15 U.S.C. §77k, provides in relevant part, that:

> (a) In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue
>
> (1) every person who signed the registration statement;
>
> (2) every person who was a director of (or person performing similar functions) or partner in, the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted....

Section 15 of the Securities Act of 1933, 15 U.S.C. §77o, provides in relevant part, that:

> Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under section 11 or 12, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable grounds to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist.

Rule 56(c) of the Federal Rules of Civil Procedure provides in relevant part that:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

STATEMENT OF THE CASE

This class action[1] was brought pursuant to Fed. R. Civ. P. 23 (a) and (b)(3) on behalf of all persons and entities who purchased the common stock of American Pacific Corporation ("AmPac" or the "Company") during the period from April 15, 1992 through and including June 11, 1993 (the "Class Period"), and a sub-Class of all persons and entities who purchased the common stock of AmPac issued in an April 15, 1992 public offering. Petitioners and the class of

---

[1] The District Court certified the case as a class action pursuant to an Order dated October 1, 1993.

investors they represent allege material misrepresentations and non-disclosures in AmPac's filings with the Securities and Exchange Commission, and other public releases and statements. These false and misleading public statements began on April 15, 1992, with the issuance of a registration statement and prospectus pursuant to which AmPac and certain of its insiders realized nearly $50 million from the sale of AmPac stock, and continued thereafter through and including June 11, 1993. Petitioners allege that Respondents violated Sections 11 and 15 of the Securities Act of 1933 and Sections 10(b) and 20(a) of the Securities Exchange Act of 1934. The Respondents are AmPac and certain of its officers and directors during the Class Period (the "individual defendants"). Jurisdiction in the District Court was based on 15 U.S.C. §§ 77v and 78aa and 28 U.S.C. §1331.

Petitioners alleged Respondents misrepresented material information during the Class Period concerning two principal components of the business of AmPac: the manufacture and sale of ammonium perchlorate ("AP"), the oxidizing agent for solid-fuel rockets; and the manufacture and sale of Halotron, a fire suppression agent.[2]

The facts relevant to this Petition are not in dispute. AmPac's principal subsidiary, Western Electrochemical Company ("WECCO"), manufactures and supplies AP for use in space exploration programs primarily to contractors in programs of the National Aeronautics and Space Administration ("NASA") and the Department of Defense.

After an explosion destroyed AmPac's AP manufacturing plant, AmPac, through WECCO, entered into a contract with Thiokol Corporation ("Thiokol") under which AmPac would construct a new AP plant and Thiokol would make minimum purchases of AP over a period of seven years. At the same

---

[2] Petitioners tried their claims based on the alleged misrepresentations concerning Halotron to a verdict in favor of Respondents. Petitioners do not seek review of any decision pertaining to the trial or the alleged misrepresentations concerning Halotron.

time, AmPac obtained a loan from Security Pacific Bank ("Security Pacific") for the financing of the AP plant (the "Loan"). Thiokol agreed to place sufficient orders with AmPac for the purchase of AP including a surcharge so that AmPac was assured repayment of the Loan.[3]

During the Class Period, the Company's principal customer for AP was Thiokol. Sales to Thiokol accounted for over 67% of AmPac's reported revenues and virtually all of its reported profits.

Respondents repeatedly represented to the public in its April 1992 Registration Statement and Prospectus and in other public statements and filings with the SEC that Thiokol and the Government (through NASA) were obligated to purchase specified quantities of AP at set prices (including a surcharge) for a guaranteed period of seven years. The contract as represented assured AmPac a revenue and income stream which insulated it from competitive pressures for the seven year term of the agreement.

Just as consistently, Thiokol reiterated its position to AmPac throughout the Class Period that it denied the existence of the multi-year contract touted by Respondents, and insisted that its obligation to purchase AP continued only until Thiokol had provided WECCO with funds sufficient to repay the Loan that the AP contract between AmPac and Thiokol was designed to secure. AmPac never disclosed Thiokol's position to the public during the Class Period.

The undisclosed dispute was so serious that both AmPac and Thiokol retained distinguished outside counsel to prepare opinion letters to support their positions. AmPac's most senior executives, including Respondents Fred D. Gibson and C. Keith Rooker, actively participated in the discussions with Thiokol and the Government about the dispute. AmPac's own outside corporate counsel advised AmPac to disclose the

---

[3] The Loan was from Security Pacific to AmPac's wholly-owned subsidiary WECCO.

existence of the dispute. AmPac did not do so, but several of the individual defendants, aware of the dispute and its significance, sold tens of thousands of shares in the April 1992 offering and during the Class Period netting themselves over $11 million.

At the end of the Class Period, in June of 1993, the investment community learned for the first time of the existence of the dispute concerning the duration and magnitude of Thiokol's purchase obligations: AmPac issued a press release disclosing that Thiokol filed a lawsuit in Utah state court seeking a declaratory judgment as to Thiokol's obligations under its contract with AmPac, and asserting that Thiokol's lawsuit was without merit. In response to this press release, the market price of the Company's stock dropped from $20.50 to $15.50 in one day (and fell further on the next trading day to $13.75). The price of AmPac's stock has never recovered.

In a motion for summary judgment with respect to the AP claims, Respondents contended that the dispute concerning the scope of Thiokol's AP purchase obligations was immaterial as a matter of law because only WECCO had the right to prepay the Loan, and unless it did so, the consequences of that prepayment upon Thiokol's continuing obligation to purchase AP were too speculative to require disclosure. Petitioners countered that the Respondents' motion misapprehended the nature of plaintiffs' claim, which was *not* whether AmPac/WECCO or Thiokol/NASA were right with respect to the underlying merits of their dispute, but rather, because Respondents publicly and repeatedly touted the Thiokol contract as assuring a seven year revenue and income stream, AmPac was under an obligation to disclose the *whole truth* concerning the contract. Primary among the information that Respondents should have disclosed is the fact that Thiokol and NASA disputed their obligations under the contract with AmPac. This dispute jeopardized both AmPac's purported secure flow of revenues and AmPac's relationship with its most important customers.

By Memorandum and Order dated November 27, 1995 (App. A-19), the United States District Court for the District of Nevada (Pro, J.) granted summary judgment against Petitioners and in favor of all Respondents with respect to Petitioners' claims relating to AP.

On June 5, 1997, a divided panel of the Ninth Circuit affirmed the District Court's grant of summary judgment. Specifically, with respect to Petitioners' claims regarding AP, the Ninth Circuit acknowledged the existence of the dispute but held:

> Thus, even if Thiokol's dubious claim regarding the effect of a repayment on its purchase obligations were correct, AmPac could only suffer if it agreed to an early pay off of the loan and thereby foolishly risked serious financial losses. Absent that almost inconceivable act by AmPac, Thiokol's assertion was simply irrelevant to AmPac's representations to the securities market and no reasonable investor could have believed otherwise. In other words, any possible negative effect resulting from the information which Abromson alleges that AmPac failed to disclose regarding its contractual relationship, rights, and duties was at most speculative and uncertain.

On September 3, 1997, the Ninth Circuit denied the Petition for Rehearing and Suggestion for Rehearing En Banc.

Petitioners seek review of the Ninth Circuit's holding that the dispute between AmPac and Thiokol during the Class Period was immaterial as a matter of law.

REASONS FOR GRANTING THE WRIT

Summary

The Ninth Circuit's decision improperly expands this Court's dictates with respect to summary judgment and ignores the Court's mandates with respect to the issue of materiality in the context of securities fraud actions. In addition,

the Court of Appeals' decision places it in conflict with the Seventh Circuit's decision in *Pommer v. Medtest Corp.*, 961 F.2d 620 (7th Cir. 1992).

First, the Court of Appeals' decision exceeds the authority under Rule 56(c) of the Federal Rules of Civil Procedure provided by this Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). In *Anderson*, this Court specifically directed lower courts not to weigh evidence in consideration of summary judgment. Yet, this is precisely what the Court of Appeals did. Without further guidance from this Court, lower courts will continue to usurp the role of the factfinder, weigh the evidence, and deprive parties of their day in court.

Second, the Court of Appeals ignored this Court's mandate with respect to the issue of materiality in a fraud on the market case. This Court, in *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), held in a fraud on the market case that the market's reaction to disclosure of previously undisclosed information must be considered in a determination of the materiality of that information. Yet, the Court of Appeals ignored this very evidence. In the present action, the price of AmPac stock fell over 25% following the disclosure of the information at issue. To ignore this evidence is to ignore *Basic*. Without further guidance from this Court, lower courts will feel free to ignore perhaps the most relevant, if not dispositive, evidence in the materiality inquiry.

Third, the Court of Appeals' decision places it in direct conflict with the Seventh Circuit's opinion in *Pommer* with respect to the correct application of the probability/magnitude test established in *Basic*. Under *Basic*, the probability of an event must be weighed against the magnitude of the loss that the event would cause to the company in determining whether the event would be material to investors of that company. In *Pommer*, the Seventh Circuit ruled that the probability/magnitude analysis is one for the jury. Here, however, the Court of Appeals took it upon itself to weigh the evidence and performed the analysis itself. The conflict between the circuits

creates an open issue on the application of the probability/magnitude test and its place in the materiality inquiry.

I.

THE NINTH CIRCUIT EXCEEDED ITS AUTHORITY UNDER RULE 56 AND *ANDERSON v. LIBERTY LOBBY* BY WEIGHING THE EVIDENCE IN THE RECORD BEFORE IT

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), this Court held that "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* at 249. Yet the Ninth Circuit based its grant of summary judgment on exactly the type of analysis of the evidence that this Court proscribed. Although the *Anderson* Court intended to clarify the role of the Federal Courts in consideration of summary judgment, the Ninth Circuit's opinion far exceeded the power permitted by this Court. Without further guidance from the Court, the Ninth Circuit's opinion will allow other courts to intrude upon the province of the jury.

In the face of statements by AmPac senior executives that the dispute between AmPac and Thiokol could have "a serious adverse effect" on the Company, and that disclosure of the dispute would result in "grave and very large damages that will be suffered by the shareholders of AmPac," the Ninth Circuit took it upon itself to conclude that "any potential loss was immaterial under the securities laws." *Abromson v. American Pacific Corp.*, 114 F.3d 898, 903 (9th Cir. 1997). In so ruling, the Ninth Circuit ignored this Court's directive that a judge "must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a

fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Anderson*, 477 U.S. at 252.

The Ninth Circuit's opinion is rife with examples that it impermissibly weighed the evidence presented in the case:

- Disregarding the existence of a written opinion by Thiokol's outside counsel supporting its position, the court concluded that Thiokol's claim in its declaratory judgment action was "dubious" (*Abromson*, 114 F.3d at 903);

- Notwithstanding the precipitous drop in the price of AmPac stock upon disclosure to the public of the dispute, the court characterized the dispute as "simply irrelevant" to investors (*Id.*);

- Similarly, the court determined that "any possible negative effect resulting from [disclosure of the dispute] was at most speculative and uncertain" (*Id.*); and

- The court weighed the evidence in Thiokol's action against AmPac and determined that "the probability that a termination would take place . . . was virtually zero" and failed to consider how the dispute would otherwise effect AmPac's relationship with Thiokol and NASA (*Id.*).[4]

In determining that there was "no probative evidence that AmPac either had agreed to or could be forced to pay off that loan," *id.* at 903, the Ninth Circuit usurped the power of the jury to determine the key issue in dispute - whether a reasonable investor would consider the existence of the dispute between AmPac and Thiokol to be an important element in his

---

[4] Not surprisingly, Judge Hawkins of the Ninth Circuit observed in his dissent that "[t]he materiality of such actions, so closely related to the integrity of AmPac's omissions, is simply inappropriate for resolution by summary judgment." *Abromson*, 114 F.3d at 904.

decision to purchase or sell shares of the Company. In other words, the Ninth Circuit did exactly what this Court in *Anderson* said not to do.

II.

THE NINTH CIRCUIT IMPROPERLY IGNORED THE MARKET REACTION TO THE DISCLOSURE OF THE DISPUTE BETWEEN AMPAC AND THIOKOL

This Court established the standard for materiality in *TSC Industries v. Northway*, 426 U.S. 438, 449 (1976):

> [T]he standard . . . contemplate[s] . . . a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.

In the context of a summary judgment motion, the *TSC* Court acknowledged that the materiality issue was "a mixed question of law and fact, involving as it does application of a legal standard to a particular set of facts." *TSC*, 462 U.S. at 450. The Court went on to hold that:

> [T]he underlying objective facts, which will often be free from dispute, are merely the starting point for the ultimate determination of materiality. The determination requires delicate assessments of the inferences a "reasonable shareholder" would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact.

Id.

The Ninth Circuit, however, has converted the materiality standard into one solely of law. As Judge Hawkins stated in

his dissent, "[i]t is difficult to imagine a more fact intensive issue than materiality. Indeed, our prior cases teach us that it is an issue which should ordinarily be left to the trier of fact." *Abromson*, 114 F.3d at 904. *See also*, *Basic Inc. v. Levinson*, 485 U.S. 224, 239 n. 16.

Moreover, in a case where plaintiffs allege a fraud on the market, as Petitioners did here, there is a rebuttable presumption that an open, developed and efficient market for the securities at issue exists.[5] *Basic*, 485 U.S. at 247. What that means, as explained by the *Basic* Court, is "that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business." *Id.* at 241 (citing *Peil v. Speiser*, 806 F.2d 1154, 1160-61 (3d. Cir. 1986)).

Although the Ninth Circuit's majority opinion cited to *Basic*, it overlooked the very bedrock of the operation of the securities market, as discussed in *Basic*, that the materiality of non-disclosed information in a fraud on the market is demonstrated by the impact on the price of stock once the information is in fact disclosed.[6]

---

[5] An "open market" is one in which anyone can buy or sell. A "developed market" is one which has a relatively high level of activity and frequency, for which trading information is widely available; it is principally a secondary market in outstanding securities. An efficient market will almost invariably be a developed one. *Freemen v. Laventhol & Horwath*, 915 F.2d 193, 198-99 (6th Cir. 1990) citing 4 Bromberg & Lowenfels, *Securities Fraud and Commodities Fraud* §8.6 (1988).

Mott v. R.G. Dickinson and Co., [1993-1994 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶98,034 at 98,372 (D. Kan. Aug. 13, 1993).

[6] The First Circuit recently observed in *Shaw v. Digital Equipment Corp.*, 82 F.3d 1194, 1218 (1st Cir. 1996) that:

> In a fraud-on-the-market case the hypothetical 'reasonable investor,' by reference to whom materiality is gauged, must be 'the market' itself, because it is the market, not any single

(Footnote continued)

Moreover, the Ninth Circuit ignored the discussion of materiality in *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972), an omissions case. In *Affiliated Ute*, this Court held: ". . . The sellers had the right to know that the defendants were in a position to gain financially from their sales and that their shares were selling for a higher price in that market. . . ." *Affiliated Ute*, 406 U.S. at 153. Indeed, the *Basic* Court also recognized "that trading (and profit making) by insiders can serve as an indication of materiality". *Basic*, 485 U.S. at 240 n. 18 (citations omitted).

As in *Affiliated Ute*, the Respondents took advantage of their knowledge of the undisclosed facts to obtain a pecuniary benefit before the negative impact of the truth's disclosure. Again, the significance of these events was not lost on Judge Hawkins in his dissent:

> . . .Thiokol's announcement that it took the position that prepayment alleviated its purchase obligations, was quickly followed by several senior AmPac executives selling off large blocks of their own stock. One particularly bold executive (who had not previously owned AmPac stock) exercised his stock options and then immediately sold the stock. Cf. *S.E.C. v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 851 (2d Cir. 1968) (en banc) (timing of insider trades, including trading by individuals who had not previously owned stock, constitutes "highly pertinent" "truly objective" evidence of materiality); *see also Basic*, 485 U.S. at 240 n. 18 (citing Texas Gulf Sulphur and acknowledging that insider trading can indicate materiality).

---

investor, that determines the price of a publicly traded security. (citations omitted).

We know what the market thought of the dispute between AmPac and Thiokol -- when it was disclosed, the price of AmPac stock dropped nearly 25% on that day.

> The majority's conclusion that the Thiokol dispute was so obviously immaterial that it should not reach a jury is belied by the dramatic fall in the per share price of AmPac's stock on the very day AmPac issued a press release revealing the Thiokol lawsuit. This precipitous drop occurred despite AmPac's attempts to reassure the public in its press release that there was no agreement to prepay the loan and the parties could not force AmPac to do so. Yet, the majority insists that no reasonable investor would find Thiokol's position relevant without an agreement by AmPac to prepay the loan.

Abromson, 114 F.3d at 905.

Here, it was undisputed that Petitioners were entitled to the invocation of the fraud on the market presumption. Thus, the market, substituting for the individual investors (*Basic*, 485 U.S. at 243-244), considered the disclosure of the dispute between AmPac and Thiokol material — the stock plummeted reflecting the import of the information once assimilated in the open, developed and efficient market for AmPac stock. Indeed, this was the *Basic* Court's very point when it adopted the fraud on the market formulation. *Id.* at 244 ("In an open and developed market, the dissemination of material misrepresentations or withholding of material information typically affects the price of the stock, and purchasers generally rely on the price of the stock as a reflection of its value." (quoting *Peil v. Speiser*, 806 F.2d at 1161)).

The existence of the dispute became public when AmPac issued a press release announcing Thiokol's declaratory judgment action. In the same press release, AmPac asserted that Thiokol's lawsuit was without merit. The market's reaction to this news was unequivocal as the price of AmPac stock fell dramatically. In other words, the market believed that the existence of the dispute was material. The Ninth Circuit's failure to consider the market's reaction, and its grant of summary judgment contravenes the mandates of *Basic* and *Anderson*.

III.

THE NINTH CIRCUIT'S APPLICATION OF THE PROBABILITY/MAGNITUDE TEST SET FORTH BY THIS COURT IN *BASIC* PUTS IT IN DIRECT CONFLICT WITH THE LAW OF OTHER CIRCUITS

In *Basic*, 485 U.S. at 232, this Court noted that in cases involving contingent or speculative information materiality must be determined by "a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity." *Id.* at 238 (citing *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968)).

The *Basic* Court held that it is the responsibility of the "factfinder" to both "assess the probability that the event will occur" and "assess the magnitude of the transaction to the issuer of the securities allegedly manipulated" (the "probability/magnitude test"). *Id.* The Court went on to note that in assessing probability the factfinder should "look to indicia of interest . . . at the highest corporate levels" including board resolutions, participation of principals in negotiations, etc. *Id.*

The probability/magnitude test was applied in *Pommer v. Medtest Corp.*, 961 F.2d 620 (7th Cir. 1992). In *Pommer*, the Seventh Circuit reversed the decision of the lower court setting aside the verdict of a jury notwithstanding the fact that the misstatements made by the defendant ultimately proved to be true. The court noted that the "securities laws approach matters from an *ex ante* perspective: just as a statement true when made does not become fraudulent because things unexpectedly go wrong, so a statement materially false when made does not become acceptable because it happens to come true." *Id.* at 623.

The *Pommer* court also determined that it was the province of the jury to determine the probability/magnitude analysis. *Id.* While the deal in question in *Pommer* was speculative, the court noted that "some deals are more likely to close than

others. Probabilities determine the value of stock." *Id.* The *Pommer* court concluded that "[e]ven a small probability of a bad event may be material if that event is grave enough." *Id.* The Ninth Circuit took a directly contrary position holding that "a company would not have to disclose a potentially serious loss, if it faced only an infinitesimal possibility that the loss would occur." *Abromson*, 114 F.3d at 902.

In this action, the evidence presented established the long-standing dispute about the effect of the early repayment of the Loan, as well as the extent to which Respondents were involved in dealing with the dispute. In addition, it was undisputed that the contract with Thiokol constituted the majority of the business of the Company. Respondents acknowledged that there would be "grave" consequences if the dispute with Thiokol became public, yet the Ninth Circuit failed to allow the jury to weigh the severity of the consequences against the likelihood of its occurrence as the *Pommer* court required. Furthermore, the Ninth Circuit's belief that there was no basis to the Thiokol claims was premised on its consideration of facts at the time of trial - failing to apply the *ex ante* analysis required by the *Pommer* court. *Abromson*, 114 F.3d at 904.

The Ninth Circuit's application of the probability/magnitude test set forth in *Basic* directly conflicts with the Seventh Circuit's application of the same test in *Pommer*. Without further guidance from this Court, it is unclear whether the probability/magnitude test is appropriately considered by the jury as in *Pommer* or by the court on summary judgment as was done here. This Court should, therefore, grant Petitioners' writ in order to resolve the conflict among the circuits and to insure that long-standing Supreme Court precedent is applied uniformly among the circuits.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

ROBERT S. SCHACHTER
Counsel of Record
DAN DRACHLER
OREN S. GISKAN
ZWERLING, SCHACHTER
& ZWERLING, LLP
767 Third Avenue
New York, NY 10017-2023
(212) 223-3900

SHELDON L. ALBERT
BARRACK, RODOS & BACINE
2001 Market Street
Philadelphia, PA 19103
(215) 963-0600

WILLIAM H. STODDARD
G. MARK ALBRIGHT
ALBRIGHT, STODDARD,
WARNICK & ALBRIGHT
801 South Rancho Drive
Las Vegas, NV 89106
(702) 384-7111

Attorneys for Petitioners

APPENDIX

Appendix

FILED

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

SEP -3 1997

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-15250
D.C. No. CV-93-00576-PMP

ORDER DENYING PETITION FOR REHEARING AND REJECTING SUGGESTION FOR REHEARING EN BANC

LESLIE ABROMSON; RONALD ANGELO; LOUIS CAMARDELLA; ELI BALLAN; ELIE DE COMINGES; SANDRA KOLKER, and the plaintiff class certified by the Court ("Class") consisting of all persons and entities who purchased the common stock of American Pacific Corporation ("AmPac") during the period from April 15, 1992 through and including June 11, 1993 and a sub-class certified by the Court ("Sub-Class") consisting of all persons and entities who purchased the common stock of AmPac issued in connection with an April 15, 1992 public offering,

Plaintiffs-Appellants

v.

AMERICAN PACIFIC CORPORATION; FRED GIBSON, JR.; C. KEITH ROOKER; DAVID KEYS; JOHN R. GIBSON; W. CARROLL; THOMAS WAR; THOMAS TURNER; NORVAL POHL; VICTOR ROSENZWEIG,

Defendants-Appellees.

No. 96-15316
D.C. No. CV-93-00576-PMP

LESLIE ABROMSON; RONALD ANGELO; LOUIS CAMARDELLA; ELI BALLAN; ELIE DE COMINGES;

SANDRA KOLKER, and the plaintiff class certified by the Court ("Class") consisting of all persons and entities who purchased the common stock of American Pacific Corporation ("AmPac") during the period from April 15, 1992 through and including June 11, 1993 and a sub-class certified by the Court ("Sub-Class") consisting of all persons and entities who purchased the common stock of AmPac issued in connection with an April 15, 1992 public offering,

Plaintiffs-Appellees

v.

AMERICAN PACIFIC CORPORATION; FRED GIBSON, JR.; C. KEITH ROOKER; DAVID KEYS; JOHN R. GIBSON; W. CARROLL; THOMAS WAR; THOMAS TURNER; NORVAL POHL; VICTOR ROSENZWEIG,

Defendants-Appellants.

Before: BRUNETTI, FERNANDEZ, and HAWKINS, Circuit Judges.

Judge Brunetti and Judge Fernandez have voted to deny the appellants' petition for rehearing. Judge Hawkins would grant the petition for rehearing. The suggestion for rehearing en banc was circulated to the Judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LESLIE ABROMSON; RONALD ANGELO; LOUIS CAMARDELLA; ELI BALLAN; ELIE DE COMINGES; SANDRA KOLKER, and the plaintiff class certified by the Court ("Class") consisting of all persons and entities who purchased the common stock of American Pacific Corporation ("AmPac") during the period from April 15, 1992 through and including June 11, 1993 and a sub-class certified by the Court ("Sub-Class") consisting of all persons and entities who purchased the common stock of AmPac issued in connection with an April 15, 1992 public offering,

Plaintiffs-Appellants,

v.

AMERICAN PACIFIC CORPORATION; FRED GIBSON, JR.; C. KEITH ROOKER; DAVID KEYS; JOHN R. GIBSON; W. CARROLL; THOMAS WAR; THOMAS TURNER; NORVAL POHL; VICTOR ROSENZWEIG,

Defendants-Appellees.

No. 96-15250

D.C. No. CV-93-00576-PMP

OPINION

LESLIE ABROMSON; RONALD ANGELO; LOUIS CAMARDELLA; ELI BALLAN; ELIE DE COMINGES; SANDRA KOLKER, and the plaintiff class certified by the Court ("Class") consisting of all persons and entities who purchased the common stock of American Pacific Corporation ("AmPac") during the period from April 15, 1992 through and including June 11, 1993 and a sub-class certified by the Court ("Sub-Class") consisting of all persons and entities who purchased the common stock of AmPac issued in connection with an April 15, 1992 public offering,

Plaintiffs-Appellees,

v.

AMERICAN PACIFIC CORPORATION; FRED GIBSON, JR.; C. KEITH ROOKER; DAVID KEYS; JOHN R. GIBSON; W. CARROLL; THOMAS WAR; THOMAS TURNER; NORVAL POHL; VICTOR ROSENZWEIG,

Defendants-Appellants.

No. 96-15316

D.C. No.
CV-93-00576-PMP

Appeals from the United States District Court
for the District of Nevada
Philip M. Pro, District Judge, Presiding

Argued and Submitted
February 11, 1997—San Francisco, Calif.

Filed June 5, 1997

Before: Melvin Brunetti, Ferdinand F. Fernandez, and Michael Daly Hawkins, Circuit Judges.

Opinion by Judge Fernandez;
Partial Concurrence and Partial Dissent by Judge Hawkins

SUMMARY

Securities/Fraud

The court of appeals affirmed a judgment of the district court. The court held that a company's failure to disclose the potential adverse effects of an early loan repayment was immaterial when the company could not be forced into early repayment.

Appellee American Pacific Corporation (AmPac) was a manufacturer of AP, an agent used in rocket fuel. When an explosion destroyed one of only two AP manufacturing facilities in the country, NASA became concerned because it wanted two sources for the agent.

AmPac entered into a contract with Thiokol, AmPac's largest customer, where it was agreed that AmPac would build an AP manufacturing facility and Thiokol would advance the funds to begin construction. AmPac took out a $92 million bank loan to finance the facility. Thiokol agreed that during the seven-year amortization period of the loan, it would place enough orders with AmPac to assure repayment of the loan and that it would pay a surcharge on all orders during the amortization period to help defray construction costs for the manufacturing facility.

AmPac began discussions with NASA and Thiokol about shortening the amortization period of the loan. The parties disagreed on whether the early repayment of the loan would free Thiokol of its obligations to purchase AP from AmPac.

Thiokol filed suit against AmPac in state court. Upon public disclosure of the lawsuit, the price of AmPac's stock dropped significantly.

Appellant Leslie Abromson filed a class action against AmPac for securities fraud, alleging misrepsesentations or

omissions regarding AmPac's relationship with Thiokol, and regarding the business prospects of the agent Halotron.

The court granted summary judgment in favor of AmPac on the Thiokol claims and granted summary judgment in favor of the outside directors of AmPac on all claims.

The case went to trial on the Halotron claims. During his opening statement, AmPac's attorney made a reference to the absence of a Securities Exchange Commission (SEC) enforcement proceeding against AmPac. An objection was sustained. After trial, a jury returned a verdict in favor of AmPac on the Halotron claims. The court entered judgment for AmPac.

Abromson appealed, contending that AmPac's failure to publicly disclose its disagreements with Thiokol and NASA regarding the contractual agreements violated the securities laws. Abromson argued that AmPac's attorney's improper remark about the absence of an SEC enforcement proceeding required a reversal, and that the court's erroneous failure to give one of her proposed instructions required a reversal.

[1] It was immaterial that AmPac omitted information about its dispute with Thiokol over the effect of prepayment of the bank loan when public disclosures were made. [2] When assessing materiality, the magnitude of the potential loss and the likelihood that it will actually occur are considered. [3] The dispute could only have had adverse consequences for AmPac if it agreed to repay the loan early or if Thiokol or NASA could have compelled early repayment. There was no evidence that AmPac had agreed to or could be forced to pay off the loan. Any possible negative effect from the information that AmPac failed to disclose was speculative and uncertain. Thus, any potential loss was immaterial.

[4] AmPac's attorney's reference to the absence of an SEC enforcement proceeding was harmless. The reference was not repeated and it was improbable that it had any effect on the verdict.

[5] Abromson waived any objection to the court's failure to give her requested jury instruction. When the court indicated that the proposed instruction was argumentative and proposed an alternative instruction, Abromson did not object. It was not clear that an objection would have been futile. By agreeing with the court's alternative instruction rather than preserving her objection, Abromson waived her right to appeal that issue.

Judge Hawkins dissented in part, writing that the fact-specific nature of the issue of the materiality of AmPac's omissions about its dispute with Thiokol made it inappropriate for resolution by summary judgment.

COUNSEL

Sheldon L. Albert and Anthony J. Bolognese, Barrack, Rodos & Bacine, Philadelphia, Pennsylvania, for the plaintiffs-appellants.

Warren L. Ettinger, Skadden, Arps, Slate, Meagher & Flom, Los Angeles, California, and Steve Morris, Morris, Brignone & Pickering, Las Vegas, Nevada, for the defendants-appellees.

Randall W. Quinn, Securities and Exchange Commission, Washington, D.C., as the amicus curiae.

OPINION

FERNANDEZ, Circuit Judge:

Leslie Abromson, Ronald Angelo, Louis Camardella, Eli Ballan, Elie de Comminges, and Sandra Kolker (collectively "Abromson"), acting on their own behalf and on behalf of a court-certified class and sub-class, appeal the district court's judgment in favor of defendants American Pacific Corporation, Fred Gibson, Jr., C. Keith Rooker, David Keys, John R. Gibson, W. Carroll, Thomas War, Thomas Turner, Norval Pohl, and Victor Rosenzweig (collectively "AmPac") in Abromson's action against AmPac for securities fraud under 15 U.S.C. §§ 77k, 77o (Securities Act of 1933, as amended, §§ 11, 15) and 15 U.S.C. §§ 78j(b), 78t (Securities Exchange

Act of 1934, as amended, §§ 10(b), 20) and 17 C.F.R. § 240.10b-5 (Rule 10b-5). Abromson alleged misrepresentations or omissions regarding AmPac's relationship with Thiokol Corporation, its largest customer, and regarding the business prospects of the fire suppression agent Halotron. The district court certified a class of plaintiffs comprising any person who purchased AmPac stock between April 15, 1992 and June 11, 1993, the "class period," and a sub-class of persons who purchased stock in AmPac's public offering of April 15, 1992. The district court granted AmPac's motion for summary judgment on the Thiokol claims and it granted summary judgment in favor of the outside directors of AmPac on all claims. After trial, a jury returned a verdict in favor of AmPac on the Halotron claims. The district court thereafter entered judgment for AmPac. Abromson appealed and AmPac cross appealed the district court's denial of its motion for judgment as a matter of law on claims that went to the jury. We affirm.

BACKGROUND

On April 15, 1992, AmPac and certain selling shareholders issued shares in a public offering of its common stock. On that date, AmPac's stock closed trading at a price of $31-1/2 per share. On June 11, 1993, AmPac's stock closed trading at a price of $20-1/2 per share. Abromson brought suit against AmPac under §§ 77k, 77o, 78j(b), 78t, and Rule 10b-5, on the basis of alleged misstatements regarding AmPac's relationship with Thiokol, the customer that provided the lion's share of AmPac's revenues (40%, 47%, and 63%, respectively, in the three years preceding 1991). Abromson alleged misrepresentations or omissions regarding AmPac's agreement to supply Thiokol with ammonium perchlorate (AP), the oxidizing agent for solid-fuel rockets.

When an explosion destroyed one of the two AP manufacturing facilities in the United States, NASA became concerned because it wanted two sources for that substance. That led to a contract between AmPac's subsidiary, Western

Electrochemical Corporation and Thiokol.[1] AmPac agreed to build a new AP manufacturing facility and Thiokol advanced the funds with which to begin construction. AmPac also entered into a loan agreement with Security Pacific Bank Washington, N.A.,[2] pursuant to which it obtained financing of $92 million for the facility. Thiokol agreed that during the seven year amortization period of the Security Pacific loan, it would place enough orders for AP to assure repayment of the loan. Moreover, Thiokol agreed to pay a surcharge on all AP orders during the amortization period of the loan in order to help defray the costs of constructing and financing the AP manufacturing facility. The agreements between Thiokol and AmPac were incorporated by reference into Thiokol's contract with NASA.

Prior to and during the class period, AmPac made numerous declarations in which it stated that Thiokol was "obligated" to purchase AP during the seven-year period following the commencement of the agreements, that these sales were "assured," and that the Thiokol contract would "insulate" AmPac from competition in the AP market. AmPac included those statements in its SEC filings, including AmPac's annual 10-K reports for 1991 and 1992, as well as the prospectus for the April 15, 1992 stock offering.

At the same time, NASA wanted to shorten the seven-year amortization period for AmPac's loan from Security Pacific, and AmPac was engaged in discussions about that with officials from NASA and Thiokol. In fact, AmPac's 1991 10-K report indicates the possibility of paying off the Security Pacific loan in 1994, three years earlier than anticipated by the original agreement. However, the parties disagreed on the

---

[1] Because the distinction between AmPac and Western Electrochemical, an AmPac subsidiary, is immaterial for purposes of this lawsuit, the name AmPac will be used to refer to both entities.

[2] Security Pacific was subsequently replaced by Seattle First National Bank; because the identity of the lender is irrelevant in this case, the loan will be referred to in this opinion as the "Security Pacific loan."

question of whether early repayment of the loan would terminate Thiokol's obligation to purchase AP from AmPac. The parties did not reach an agreement on repayment, and they continued to disagree regarding the effect of any repayment upon Thiokol's purchase obligations.

The public became aware of the disagreement on June 11, 1993, when Thiokol filed suit in Utah state court against AmPac and sought a judicial declaration that complete repayment of the Security Pacific loan would terminate Thiokol's contractual obligation to purchase AP from AmPac. Thiokol alleged that AmPac had agreed to early repayment of the loan. That agreement simply did not exist, and there was no evidence that it did. Upon public disclosure of Thiokol's lawsuit, the price of AmPac's stock dropped precipitously. Abromson asserts that AmPac should have publicly disclosed the disagreement among it, NASA, and Thiokol regarding the contractual agreements and that the failure to do so violated the securities laws.

Abromson also faults AmPac's disclosures with respect to Halotron, a fire suppression agent intended to replace Halon, a more widely used substance that may cause damage to the ozone layer. The district court denied AmPac's request for summary judgment and the case went to trial on the Halotron claims. During his opening statement regarding them, AmPac's attorney made reference to the absence of a Securities and Exchange Commission enforcement proceeding against the defendants. Abromson now argues that the remark was improper and that it requires reversal of the judgment. In addition, Abromson argues that the court's failure to give one of her proposed instructions was an error requiring reversal. AmPac moved for judgment as a matter of law on the Halotron claims both at the close of Abromson's case and at the close of all evidence. It now cross appeals the district court's denial of those motions.

JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction pursuant to 28 U.S.C. § 1331. We have jurisdiction pursuant to 28 U.S.C. § 1291.

We review de novo a district court's grant of summary judgment. *See Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 1261, 134 L. Ed. 2d 209 (1996); *Jesinger v. Nevada Fed. Credit Union*, 24 F.3d 1127, 1130 (9th Cir. 1994). We must determine whether "the evidence, viewed in a light most favorable to the nonmoving party, presents any genuine issues of material fact and whether the district court correctly applied the law." *Warren*, 58 F.3d at 441; *see Jesinger*, 24 F.3d at 1130. Our review "is governed by the same standard used by the trial court under Federal Rule of Civil Procedure 56(c)." *Jesinger*, 24 F.3d at 1130. In the trial court, the party moving for summary judgment has the initial burden of "'showing'--that is pointing out to the District Court--that there is an absence of evidence to support the nonmoving party's case," when the nonmoving party bears the burden of persuasion on the issue in question. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986). "Summary judgment may be defeated in a securities fraud derivative suit 'only by showing a genuine issue of fact with regard to a particular statement by [the company] or its insiders.'" *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 500 (9th Cir. 1992) (quoting *Schneider v. Vennard* (*In re Apple Computer Sec. Litig.*), 886 F.2d 1109, 1118 (9th Cir. 1989)).

We review a district court's formulation of civil jury instructions for an abuse of discretion. *See Fikes v. Cleghorn*, 47 F.3d 1011, 1013 (9th Cir. 1995). The district court must formulate jury instructions so that they fairly and adequately cover the issues presented, correctly state the law, and are not misleading. *See id.* We consider the instructions as a whole and apply an abuse of discretion standard to determine if they are misleading or inadequate. *See Masson v. New Yorker Magazine, Inc.*, 85 F.3d 1394, 1397 (9th Cir. 1996). We will not reverse an error in instructing the jury in a civil case if it is more probably than not harmless. *See Phillips v. United States Internal Revenue Serv.*, 73 F.3d 939, 941 (9th Cir. 1996).

DISCUSSION

I. *Summary Judgment on Thiokol Claim*

[1] Abromson asserts that when public disclosures were made AmPac improperly omitted information that there was a dispute with Thiokol over the issue of the effect of the prepayment of the Security Pacific loan by AmPac. She claims that the omission was material. We do not agree.

[2] "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important...." *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449, 96 S. Ct. 2126, 2132, 48 L. Ed. 2d 757 (1976); *see Basic, Inc. v. Levinson*, 485 U.S. 224, 231, 108 S. Ct. 978, 983, 99 L. Ed. 2d 194 (1988). To survive a motion for summary judgment, a plaintiff must demonstrate that a failure to disclose particular information conveyed a false or misleading impression. *See Hanon*, 976 F.2d at 501. We have considered a failure to disclose material only when the company had certain, concrete information contradicting its optimistic or positive statements. *See, e.g., Kaplan v. Rose*, 49 F.3d 1363, 1371-74 (9th Cir. 1994); *Hanon*, 976 F.2d at 503; *In re Apple Computer*, 886 F.2d at 1115-16. We have also held that a plaintiff cannot demonstrate a material omission on the basis of "speculative, nebulous" evidence. *See Miller v. Pezzani* (*In re Worlds of Wonder Sec. Litig.*), 35 F.3d 1407, 1418 (9th Cir. 1994); *see also ZVI Trading Corp. Employees' Money Purchase Pension Plan & Trust v. Ross* (*In re Time Warner Sec. Litig.*), 9 F.3d 259, 267 (2d Cir. 1993) (a company does not have to disclose poor progress in business negotiations, even when it previously made optimistic statements about the prospects of those dealings). When assessing materiality, we consider both the magnitude of the potential loss and the likelihood that it will actually take place. *See Basic*, 485 U.S. at 238, 108 S. Ct. at 987. For example, a company would not have to disclose a potentially serious loss, if it faced only an infinitesimal possibility that the loss would occur.

[3] Abromson focuses on AmPac's failure to disclose its disagreement with Thiokol regarding the effect of an early

repayment of the Security Pacific loan. However, that disagreement could have had adverse consequences for AmPac only if it had agreed to early repayment of the Security Pacific loan or if Thiokol or NASA could have compelled early repayment. But, there was *no* probative evidence that AmPac either had agreed to or could be forced to pay off that loan. In fact, in the action it filed in Utah, even Thiokol did not allege that it could compel early repayment. Rather, it baldly asserted in its declaratory judgment complaint that AmPac had already agreed to an early repayment. However, no such agreement existed, and there was no evidence that it did. Thus, even if Thiokol's dubious claim regarding the effect of a repayment on its purchase obligations were correct, AmPac could only suffer if it agreed to an early pay off of the loan and thereby foolishly risked serious financial losses. Absent that almost inconceivable act by AmPac, Thiokol's assertion was simply irrelevant to AmPac's representations to the securities market and no reasonable investor could have believed otherwise. In other words, any possible negative effect resulting from the information which Abromson alleges that AmPac failed to disclose regarding its contractual relationship, rights, and duties was at most speculative and uncertain. Indeed, assuming that an early termination of Thiokol's purchase obligation might possibly have had a serious effect on AmPac, the probability that a termination would take place without action by AmPac to fully protect its position was virtually zero. Therefore, any potential loss was immaterial under the securities laws.[3]

---

[3] We are aware of the fact that some stock was sold by insiders at the relevant times. But that does not automatically require disclosure of otherwise immaterial events. Rather, the presence of insider sales is at most probative of materiality. *See Basic*, 485 U.S. at 240 n. 18, 108 S. Ct. 988 at n.18. Abromson has not presented evidence that the timing of the insider trades "virtually compels" a finding that those trades resulted from the Thiokol dispute. *Cf. SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 851 (2d Cir. 1967). In fact, if insiders knew anything, they knew that AmPac had not agreed to repay the loan, could not be forced to do so, and had not been informed of assertions to the contrary.

II. *Halotron Claim*

In his opening statement to the jury, counsel for AmPac stated that the SEC had not proceeded against AmPac. There was an immediate objection, which was sustained. Abromson now asserts that the very mention of that matter was sufficient to constitute reversible error.

[4] We have not previously decided whether a reference during the trial of a private securities action to the absence of a SEC enforcement proceeding constitutes error at all. We do not reach that question today because it is clear that the reference was harmless. "[W]hen an appellate court ponders the probable effect of an error on a civil trial, it need only find that the jury's verdict is more probably than not untainted by the error." *Haddad v. Lockheed Calif. Corp.*, 720 F.2d 1454, 1459 (9th Cir. 1983). Moreover, we have refused to find reversible error where concededly improper remarks were made, but not repeated, during opening statements or closing arguments. *See, e.g., Kehr v. Smith Barney, Harris Upham & Co., Inc.*, 736 F.2d 1283, 1286 (9th Cir. 1984); *United States v. Vargas-Rios*, 607 F.2d 831, 838 (9th Cir. 1979); *Moore v. Telfon Communications Corp.*, 589 F.2d 959, 966 (9th Cir. 1978); *United States v. Hood*, 493 F.2d 677, 681-82 (9th Cir. 1974). The trial of the Halotron claim lasted eighteen days. The allegedly improper reference to the SEC that Abromson complains of occurred in AmPac's opening statement, and the district court instructed the jury that it should only rely on the evidence in the case. It also stated that there would be no evidence on the subject of the absence of an SEC proceeding. The reference was not repeated, and it is highly improbable that it had any effect on the verdict. Thus it was harmless.

[5] Abromson complains of the district court's failure to give her requested jury instruction on the specific legal standard regarding misleading projections and statements of belief and optimism. However, she has waived any objection. When the district court indicated that the proposed instruction was argumentative and proposed a different one that covered the matter, she did not object, even though it cannot be said that

an objection would have been futile. Instead, Abromson acquiesced in the court's substitute instruction. The court said, "Take a look at this one," and her attorney said, "That's acceptable from our perspective, your honor." By agreeing with the court, rather than preserving an objection to the court's denial of the proposed jury instruction, Abromson waived her right to appeal that issue. *See* Fed. R. Civ. P. 51 ("No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection."); *see also Hammer v. Gross*, 932 F.2d 842, 847 (9th Cir. 1991) (en banc) (Canby, J., plurality opinion); *Lifshitz v. Walter Drake & Sons, Inc.*, 806 F.2d 1426, 1430 (9th Cir. 1986). In light of her acquiescence in the court's ruling, it can hardly be said that Abromson "stated distinctly" the matter objected to and the ground of the objection.[4]

III. *Cross-Appeal*

Our decision to affirm the district court's final judgment renders AmPac's cross-appeal moot. We therefore dismiss it. *See Kapp v. National Football League*, 586 F.2d 644, 649-50 (9th Cir. 1978).

The judgment of the district court is **AFFIRMED**. AmPac's cross-appeal is **DISMISSED**.

HAWKINS, Circuit Judge, Concurring in Part and Dissenting in Part:

I concur in Parts II (Halotron) and III (Cross-Appeal) of the majority, but regret that I cannot embrace the affirmance of the grant of summary judgment to AmPac on the Thiokol claim.

---

[4] Because we hold that the district court properly gave judgment against Abromson on her claims against the company, we need not discuss her appeal of its judgment in favor of the outside directors. Clearly, there was no wrong to hold them responsible for.

While officials of AmPac were telling the investing public that the company was "insulated from competition" because of Thiokol's obligation to purchase its product, AmPac insiders sold off approximately $11 million worth of stock. When the investing public learned what the insiders already knew--that Thiokol believed it would be free of the obligation upon AmPac's prepayment of the Security Pacific obligation--AmPac's stock plummeted in value. There may be a perfectly reasonable explanation for these events, but no jury ever heard it. The materiality of such actions, so closely related to the integrity of AmPac's omissions, is simply inappropriate for resolution by summary judgment.

To succeed on the Thiokol claim, the plaintiff needed to demonstrate a "material" omission or misrepresentation. *Gray v. First Winthrop Corp.*, 82 F.3d 877, 884 (9th Cir. 1996) (elements of Rule 10b-5 claim); *Kaplan v. Rose*, 49 F.3d 1363, 1371 (9th Cir. 1994) (elements of § 77(k) claim). "It is a violation of the securities law to omit to state a material fact if it is 'necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.'" *Vaughn v. Teledyne, Inc.*, 628 F.2d 1214, 1221 (9th Cir. 1980) (quoting 17 C.F.R. § 240.10b-5(b) (1979); 15 U.S.C. § 78n(c)).

The district court granted summary judgment to AmPac with respect to the Thiokol claim on the ground that AmPac's failure to disclose the Thiokol dispute did not constitute an omission of material fact. It is difficult to imagine a more fact intensive issue than materiality. Indeed, our prior cases teach us that it is an issue which should ordinarily be left to the trier of fact. *See, e.g., Basic, Inc. v. Levinson*, 485 U.S. 224, 239-40 (1988); *Kaplan*, 49 F.3d at 1381; *Schneider v. Vennard* (*In re Apple Computer Sec. Litig.*), 886 F.2d 1109, 1113 (9th Cir. 1989).

Summary judgment on the grounds that the alleged misstatements were not material is appropriate "only if the adequacy of the disclosure or the materiality of the statement is 'so obvious that reasonable minds [could] not differ.'" *Fecht*

v. The Price Company, 70 F.3d 1078, 1081 (9th Cir. 1995) (quoting *Durning v. First Boston Corp.*, 815 F.2d 1265, 1268 (9th Cir. 1987).

Abromson opposed summary judgment by arguing that AmPac's positive statements about the Thiokol contracts were rendered materially misleading by two developments: (1) the government's desire to force early repayment of the loan; and (2) the parties' disagreement regarding the effect of an early repayment on Thiokol's contractual obligations to AmPac. The majority dismisses Abromson's contention, emphasizing that AmPac would not "foolishly" risk financial loss by prepaying the loan to Security Pacific. This ignores that there was a real live dispute as to whether NASA and/or Thiokol (in view of all the documents, not just the loan agreement between AmPac and Security Pacific) had the right to *compel* prepayment by AmPac. Furthermore, at the time that the government, Thiokol, and AmPac were in the midst of contract discussions over the impact of repayment, Thiokol's announcement that it took the position that prepayment alleviated its purchase obligations, was quickly followed by several senior AmPac executives selling off large blocks of their own stock. One particularly bold executive (who had not previously owned AmPac stock) exercised his stock options and then immediately sold the stock. *Cf. S.E.C. v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 851 (2d Cir. 1968) (en banc) (timing of insider trades, including trading by individuals who had not previously owned stock, constitutes "highly pertinent" "truly objective" evidence of materiality); *see also Basic*, 485 U.S. at 240 n. 18 (citing *Texas Gulf Sulphur* and acknowledging that insider trading can indicate materiality).

The majority's conclusion that the Thiokol dispute was so obviously immaterial that it should not reach a jury is belied by the dramatic fall in the per share price of AmPac's stock on the very day AmPac issued a press release revealing the Thiokol lawsuit. This precipitous drop occurred despite AmPac's attempts to reassure the public in its press release that there was no agreement to prepay the loan and the parties could not force AmPac to do so. Yet, the majority insists that

no reasonable investor would find Thiokol's position relevant without an agreement by AmPac to prepay the loan.

The standard for materiality (as the majority itself states it) is whether a jury could find a substantial likelihood that a reasonable shareholder would consider it important to know all these matters. *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). Because of the fact-specific nature of this inquiry, the standard for summary judgment on the issue of materiality is quite high: summary judgment is inappropriate unless the undisclosed matter is so obviously immaterial that reasonable minds could not differ. *Fecht*, 70 F.3d at 1081. In other words, the matter need not obviously *be* material--it is enough to survive summary judgment if reasonable minds might disagree as to materiality.

I believe the district court erred in finding the Thiokol dispute immaterial, especially when AmPac insiders, armed with knowledge the investing public lacked, avoided the very losses that befell ordinary stockholders when Thiokol's position became publicly known. Public confidence in our securities markets is essential to investor and promoter alike. Perhaps there is a perfectly sensible explanation for the stock activities here, an explanation having nothing to do with what the AmPac insiders knew and the investing public did not. The summary judgment grant on the Thiokol claim, however, not only deprived plaintiffs of their opportunity to have a jury decide the issue, it also meant that AmPac officials could not tell their side of the story and have it tested by time-honored adversarial tools such as cross-examination. Both sides are left with more questions, and questions about their actions, than answers. Summary judgment was never meant to so short-circuit the search for truth and the average person's day in court. I respectfully dissent from the decision to affirm summary judgment on this issue.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Nov 27 352 PM '95

* * *

In re: AMERICAN PACIFIC SECURITIES LITIGATION This Document Relates To: ALL ACTIONS.	CV-S-93-576-PMP (LRL) (Base file) *ORDER*

This is a class action alleging various securities violations against American Pacific Corporation ("AmPac"). The Class consists of all persons and entities who purchased the common stock of AmPac during the period from April 15, 1992, through June 11, 1993 (the "Class Period"). the Sub-Class consists of all persons and entities who purchased the common stock of AmPac issued in an April 15, 1992, public offering.[1] Plaintiffs allege material misrepresentations and nondisclosures in AmPac's filings with the Securities and Exchange Commission ("SEC") as well as public releases and statements issued during the Class Period Violated § 11 of the Securities Act of 1933 ("1933 Act"), § 10(b) of the Securities Exchange Act of 1934 ("1934 Act"), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5, promulgated thereunder.

Before the Court is the Outside Directors' Motion for Summary Judgment (# 79) filed August 31, 1995 on behalf of

[1] The Court certified the Class and Sub-Class by Order (#20) entered October 4 1993. Pursuant to the Court's Order (#77) entered August 15, 1995, notice of this action was mailed to over twenty thousand members of the Class and Sub-Class, and a summary notice was printed on September 14, 1995 in the national edition of the Wall Street Journal as well as the Las Vegas Review-Journal. No class member has opted for exclusion from the class.

individual defendants Thomas J. War, Thomas A. Turner, Morval F. Pohl, W.J. Carroll, and Victor M. Rosenzweig (collectively, the "Outside Directors"). Plaintiffs filed a Memorandum of Points and Authorities in opposition to Defendants' Motions for Summary Judgment (# 88) on October 6, 1995. The Outside Directors filed a Reply (# 102A) on November 6, 1995.

Also before the Court is a Motion for Summary Judgment (# 80) filed August 31, 1995 on behalf of AmPac and all individual defendants[2] (collectively, "Defendants"). Plaintiffs filed a Memorandum of Points and Authorities in Opposition to Defendants' Motions for Summary Judgment (# 88) on October 6, 1995. The Defendants filed a Reply (# 102B) on November 6, 1995.

This case is currently scheduled to proceed to trial on December 11, 1995.

---

[2] The individual Defendants are as follows: Fred D. Gibson, Jr., the President, Chief Executive Officer, and Board Chairman of AmPac; C. Keith Rooker, the Executive Vice-President General Counsel and Director; David N. Keys, the Chief Financial and Accounting Officer and Director; and the Board Directors W.J. Carroll, Thomas L. War, Thomas A. Turner, Norval F. Pohl, Victor M. Rosenzweig, and John Gibson.

I. Background

A. Ammonium Perchlorate

Through its subsidiary Western Electrochemical Company ("WECCO"), AmPac manufactures and supplies ammonium perchlorate ("AP"), the oxidizing agent for solid-fuel rockets, booster motors and missiles used by the aerospace and national defense industries. During the Class Period, AmPac's principal customer for AP was Thiokol Corporation ("Thiokol"), the prime contractor for the National Aeronautics and Space Administration ("NASA"), which would use the AP it purchased to manufacture rocket boosters sold to NASA for the Space Shuttle.

In May 1988, the offices and manufacturing facilities of Pacific Engineering & Production Co. of Nevada ("PEPCON"), WECCO's predecessor, were destroyed in a series of massive fires and explosions. As a result, the nation lost approximately one-half of its capacity to produce AP.

Since AmPac was one of only two domestic manufacturers of AP, NASA and the Department of Defense ("DOD") began intense discussions with AmPac and Thiokol regarding the construction of a new manufacturing facility in Iron County, Utah. To arrange for such construction, WECCO and Thiokol, with the consent of NASA, entered into a series of agreements (the "Thiokol Agreements"). The Thiokol Agreements contained two components: an Advance Agreement and a Surcharge Agreement. These Agreements obligated WECCO to construct a new AP facility from financing obtained by Security Pacific Bank Washington, N.A. ("Security Pacific"), to be amortized through the collection of a surcharge on all sales of AP by WECCO to Thiokol. In return, Thiokol was obligated to purchase a minimum amount of AP so that WECCO could finance the loan repayments.[3] The extent of this obligation is disputed.

---

[3] The Surcharge Agreement states:

(Footnote continued)

The Thiokol Agreements contained a clause regarding the collection of the surcharge. That portion reads in part as follows:

> The Formula [for determining the surcharge] provides that the principal at the Loan will be amortized over 140 million pounds of AP and over a scheduled amortization period of seven years beginning on March 1, 1990, although delivery of more than 20 million pounds of AP in any year may shorten the amortization period of the Loan.

Plaintiff's Exhibit 2, § 3(a).

WECCO obtained a Loan Agreement of up to $92 million from Security Pacific to finance construction of the new manufacturing facility. Under the terms of the Loan Agreement, WECCO could prepay the loan but would be charged a prepayment penalty. NASA allegedly approached WECCO to inquire about funding the prepayment of the loan.

An alleged dispute arose between AmPac, Thiokol and NASA regarding the consequences of prepayment of the loan. As early as 1991, certain individuals connected with both Thiokol and NASA allegedly expressed the opinion that the Thiokol Agreements did not obligate Thiokol to purchase a minimum amount of AP from WECCO during the seven-year period if the loan was prepaid. An alleged dispute ensued, and Thiokol ultimately filed an action in Utah state court on June 10, 1993, seeking a declaratory judgment that Thiokol's obligations to purchase AP from WECCO ended upon repayment

---

> [Thiokol] shall, for the benefit of [Security Pacific] and WECCO, place or cause to be placed with WECCO sufficient orders for delivery of AP such that WECCO will receive revenues, when combined with the revenues from other customers of WECCO, in each Order Quarter . . . with respect to at least 5,000,000 pounds of AP at the price determined pursuant to Section 3 hereof.

Plaintiffs' Exhibit 2, § 2(a).

of the Security Pacific Loan. When AmPac announced the filing of the complaint by Thiokol, AmPac's stock price dropped dramatically.

The parties executed amended agreements to the AP Agreements on May 10, 1994 (the "Amended Agreement"). Under the Amended Agreement, AmPac agreed to pay all principal and interest on the Loan, and Thiokol confirmed that its AP purchase obligations would be maintained for a seven-year period commencing in August 1989.

In this lawsuit, Plaintiffs allege that Defendants misrepresented the certainty, duration and magnitude of AmPac's contractual relationship with Thiokol. Specifically, Plaintiffs allege that Defendants falsely represented throughout the period of the "dispute" that Thiokol had certain obligations under the Thiokol Agreements that required Thiokol and the United States Government to purchase specific quantities of AP at minimum prices for a period of seven years.

B. Halotron

Beginning in 1989, the Montreal Protocol on Substances that Deplete the Ozone Layer froze the level of production of halons, the fire suppression agents used by the military to fight aircraft fires, and mandated an end to the production of halons by the year 2000. Responding to this mandate, the United States Air Force announced a ban on the purchase of controlled ozone layer depleting substances, including halons, effective July 1, 1992. The United States military then initiated a project to find a viable fire suppressing alternative to halons.

In 1991, AmPac acquired an option to purchase the worldwide rights to Halotron, a fire suppression agent that potentially could replace halons. In this lawsuit, Plaintiffs allege that Defendants misrepresented the test results of Halotron as an environmentally sound fire suppression agent, the acceptance of Halotron as an effective substitute for the United States military, and the actual sale of Halotron to the military.

II. Standard for Summary Judgment

Pursuant to Federal Rule of Civil Procedure 56, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The party moving for summary judgment has the initial burden of showing the absence of a genuine issue of material fact. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *Zoslaw v. MCA Distributing Corp.*, 693 F.2d 870, 883 (9th Cir. 1982), *cert. denied*, 460 U.S. 1085 (1983). Once the movant's burden is met by presenting evidence which, if uncontroverted, would entitle the movant to a directed verdict at trial, the burden then shifts to the respondent to set forth specific facts demonstrating that there is a genuine issue for trial. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 250 (1986). If the factual context makes the respondent's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *California Architechtural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988).

If the party seeking summary judgment meets this burden, then summary judgment will be granted unless there is significant probative evidence tending to support the opponent's legal theory. *First Nat'l Bank v. Cities Service Co.*, 391 U.S. 253, 290, (1968), *reh'g denied,* 393 U.S. 901 (1968); *Commodity Futures Trading Com. v. Savage*, 611 F.2d. 270 (9th Cir. 1979). Parties seeking to defeat summary judgment cannot stand on their pleadings once the movant has submitted affidavits or other similar materials. Affidavits that do not affirmatively demonstrate personal knowledge are insufficient. *British Airways Board v. Boeing Co.*, 585 F.2d 946, 952 (9th

Cir. 1978), *cert. denied*, 440 U.S. 981 (1979), *reh'g denied*, 441 U.S. 968 (1979). Likewise, "legal memoranda and oral argument are not evidence and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment." *Id.*

A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the differing versions of the truth. *See Admiralty Fund v. Hugh Johnson & Co.*, 677 F.2d 1301, 1305-06 (9th Cir. 1982); *Admiralty Fund v. Jones*, 677 F.2d 1289, 1293 (9th Cir. 1982).

All facts and inferences drawn must be viewed in the light most favorable to the responding party when determining whether a genuine issue of material fact exists for summary judgment purposes. *Poller v. CBS, Inc.*, 368 U.S. 464 (1962). After drawing inferences favorable to the respondent, summary judgment will be granted only if all reasonable inferences defeat the respondent's claims. *Admiralty Fund v. Tabor*, 677 F.2d 1297, 1298 (9th Cir. 1982).

The trilogy of Supreme Court cases cited above establishes that "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp.*, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1). *See also Avia Group International, Inc. v. L.A. Gear California, Inc.*, 853 F.2d 1557, 1560 (Fed. Cir. 1988).

III. Plaintiff's Claims Regarding Ammonium Perchlorate

A. Legal Standards

To prove a Rule 10b-5 claim, a Plaintiff must establish (1) a material misstatement or omission; (2) scienter; (3) reliance; (4) causation; and (5) damages. *In re Clearly Canadian Sec. Litig.*, 875 F. Supp. 1410, 1414 (N.D. Cal. 1995).

To prove a § 11 claim, a Plaintiff must establish a material misstatement or omission specifically in a prospectus. 15 U.S.C. § 77k (1994). A § 11 claim does not require a showing

of "scienter." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983).

B. Materiality

"[A]n omitted fact is material if a reasonable investor would have been misled about the nature of an investment." *Kaplan v. Rose*, 49 F.3d 1363, 1381 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 58 (1995). This is because there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Basic Inc. v. Levinson*, 485 U.S. 224, 231-232 (1988) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1986)). Whether an omission is "material" is a determination that "requires delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact." *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976). Materiality is a fact-specific issue which should ordinarily be left to the trier of fact. *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1412 (9th Cir. 1994) (cit*ing Hanon v. Dataproducts Corp.*, 976 F.2d 497, 500 (9th Cir. 1992)), *cert. denied*, 116 S. Ct. 277 (1995). Whether a public statement is misleading, or whether facts were adequately disclosed is a mixed question of law and fact generally to be decided by the trier of fact. *Durning v. First Boston Corp.*, 815 F.2d 1265, 1268 (9th Cir. 1987), *cert. denied*, 484 U.S. 944 (1987) (quoting *TSC Indus.*, 426 U.S. at 450). Only if the adequacy of the disclosure or the materiality of the statement is "so obvious that reasonable minds [could] not differ" is the issue appropriately resolved on summary judgment. *Durning*, 815 F.2d at 1268.

Defendants assert that the discussions regarding the dispute were not material since the outcome was uncertain and speculative and move for summary judgment on this basis. Defendants rely on the rule announced by the Supreme Court in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988).

In *Basic*, the Supreme Court considered the standard of materiality applicable to preliminary merger discussions for the purposes of § 10(b) of the 1934 Act and Rule 10b-5. *Basic*, 485 U.S. at 239. In that case, Basic Incorporated held discussions beginning in 1976 with Combustion Engineering regarding the possibility of a merger. *Id.* at 227. During 1977 and 1978, Basic made three public statements denying that it was engaged in merger negotiations. *Id.* Basic later announced that it was approached by another company concerning a merger, and subsequently announced its acceptance of Combustion's tender offer. *Id.* at 228. The plaintiff shareholders alleged that the three public statements were false or misleading and violated § 10(b) and Rule 10b-5. *Id.*

The Supreme Court considered several standards with regard to preliminary merger discussions, and adopted the rule set out in *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968) (en banc), *cert. denied*, 394 U.S. 976 (1969). *Basic*, 485 U.S. at 239. That rule states that materiality "will depend at any time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity." *Id.* at 238 (quoting *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d at 849). This probability/magnitude balancing approach is a fact-specific inquiry.[4] *Id.* at 240.

The Ninth Circuit reads the *Basic* rule regarding materialty broadly and applies it in situations where the alleged misstatement or omission concerns a contingent or speculative event. *See Hanon v. Dataproducts Corp.*, 976 F.2d 497, 504-06 (9th Cir. 1992). In *Hanon*, a former shareholder of Dataproducts sued the corporation and its CEO for securities fraud arising from the failure of the defendants to disclose, among others, (1) the company's decision to discontinue two

---

[4] Since the lower court did not consider the standard announced by the Supreme Court in *Basic*, the Supreme Court remanded the case for consideration of the motion for summary judgment in light of its ruling. *Basic*, 485 U.S. at 241.

printers it manufactured and (2) the company's decision to close one of its production facilities. *Id.*

With regard to the printers, the plaintiff in *Hanon* alleged that the company decided to discontinue the printers in March 1989, but misled the market by failing to disclose this fact until six months later. *Hanon*, 976 F.2d at 504. Plaintiff propounded several items of evidence to support his claim, but the Ninth Circuit concluded that "the most [plaintiff's] evidence shows is that [defendants] knew in March 1989 that 'the [printer] would be discontinued *at some point*' . . . . This evidence does not meet the level of certainty required to make the statements material." *Id.* (citations omitted) (italics in original).

With regard to the production facility, the plaintiff in *Hanon* alleged that the defendants decided in early 1988 to close the facility, but concealed that decision until it issued a press release in May 1989 announcing the sale. *Hanon*, 976 F.2d at 505. Plaintiff produced a report stating that the "consensus" of defendants was to close the facility in "3 to 5 years." *Id.* at 505-06. The Ninth Circuit rejected this claim under the materiality standard, reasoning that "[d]iscussions among management staff regarding potential action to be taken sometime in the distant future is not an item appropriately made a part of a public disclosure because of its speculativeness." *Id.* at 506.

Accordingly, under Ninth Circuit precedent, where the alleged misstatement or omission concerns a contingent or speculative event, the Court must apply the *Basic* rule. *See Hanon*, 976 F.2d at 504 & 506; *see also In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1417 (9th Cir. 1994) (speculative impact of possible future customer exchanges and price reductions not material); *Vaughn v. Teledyne, Inc.*, 628 F.2d 1214, 1221-22 (9th Cir. 1980) (affirming summary judgment for defendants because financial projections not made with 'reasonable certainty' are not material and may not be disclosed to the public). In this case, the alleged dispute between Thiokol and WECCO concerned a speculative event:

whether WECCO in fact would exercise its right to prepay the Loan. Accordingly, the Court will apply the *Basic* test, balancing the magnitude of the prepayment with the probability of its occurrence. *See Basic*, 485 U.S. at 239; *Hanon*, 976 F.2d at 504 & 506.

Plaintiffs offer no evidence indicating that the prepayment of the Loan would occur. The Loan Agreement provided that only WECCO, as the Borrower, could prepay the Loan. Defendants Exhibit 3, Loan Agreement, § 3.3. Plaintiffs offer evidence tending to show that individuals from both the Government and Thiokol approached WECCO to inquire about funding WECCO's prepayment of the Loan. This evidence does not show that WECCO would effect prepayment.

Under the terms of the Loan Agreement, once WECCO notified Security Pacific of its intention to prepay the Loan, that intention was irrevocable. Defendants' Exhibit 3, Loan Agreement, § 3.3. Plaintiffs offer no evidence that WECCO notified Security Pacific of its intention to prepay the Loan, thereby exercising its right to prepayment. It is undisputed that WECCO did not exercise its right to prepay the Loan and did not notify Security Pacific of its intention to prepay the Loan until the Amended Agreements were signed in May 1994.

Plaintiffs assert that they were receiving pressure by the Government to prepay the Loan, and they might have succumbed to such pressure since refusing could have harmed their business interests. While Plaintiffs are entitled to all favorable inferences, mere speculation will not defeat a motion for summary judgment. *Hahn v. Sargent*, 523 F.2d 461, 467 (9th Cir. 1975), *cert. denied*, 425 U.S. 904 (1976); *Richards v. Nielsen Freightlines*, 602 F. Supp. 1224, 1231 (E.D. Cal. 1985), *aff'd*, 810 F.2d 898 (9th Cir. 1987).

Plaintiffs make much of the fact that when Thiokol filed their complaint for declaratory relief in Utah court, the stock price of AmPac dropped considerably. The Thiokol complaint alleged that WECCO had agreed to prepayment of the Loan. However, Plaintiff has failed to produce any evidence

showing that WECCO did in fact agree to prepayment of the Loan during the relevant period. Allegations in the Thiokol complaint cannot defeat a motion for summary judgment. *See British Airways Board*, 585 F.2d at 952 ("legal memoranda . . . [is] not evidence and [does] not create issues of fact capable of defeating an otherwise valid motion for summary judgment").

Plaintiffs finally produce evidence that Thiokol asserted the position that it had the right to prepay the Loan. Whether or not Thiokol intended to fund the prepayment of the Loan, it is evident from the clear and unambiguous language of the Loan Agreement that only WECCO could prepay the Loan. Based on Plaintiffs' inability to produce any evidence that WECCO agreed to prepay the Loan, the Court finds that the probability of the contingent event, Thiokol's refusal to honor its minimum purchase obligations under the AP Agreements, was minimal since WECCO never asserted its right to prepay the Loan.

With regard to the magnitude prong of the *Basic* rule, Defendants assert that WECCO would only agree to prepayment of the Loan if it were guaranteed revenues from the sale of AP that met or surpassed those anticipated under the original AP Agreements. Plaintiffs cannot counter these assertions. Accordingly, the Court finds that the magnitude of the contingent event, Thiokol's refusal to honor its minimum purchase obligations under the AP Agreements, was minimal.[5]

Since WECCO never opted to prepay the Loan, any alleged dispute regarding prepayment of the Loan is illusory at best. Plaintiffs have not sustained their burden in producing evidence that the statements and omissions regarding the AP Agreements were material. *See Basic*, 485 U.S. at 238-40; *Hanon*, 976 F.2d at 504-506.

---

[5] Indeed, the Amended AP Agreements, executed in May 1994, established that WECCO would prepay the Loan and established that Thiokol's obligations to purchase AP over the seven-year period would remain. *See* Defendants' Exhibit 15.

As the § 10(b) claim, the Rule 10b-5 claim, and the § 11(a) claim all rely on the materiality of the alleged misstatements or omissions, the Court will grant summary judgment on all of these claims to the extent that they allege misstatements and omissions with regard to AP.

IV. Plaintiffs' Claims Regarding Halotron

A. Opinion

Defendants first assert that its alleged misstatements concerning Halotron are not actionable because they are only statements of opinion. A projection or statement of belief is a "factual" misstatement actionable under the securities laws if one of three implied factual assertions is inaccurate: "(1) that the statement is genuinely believed, (2) that there is a reasonable basis for that belief, and (3) that the speaker is not aware of any undisclosed facts tending to seriously undermine the accuracy of the statement." *In re Wells Fargo Securities Litigation*, 12 F.3d 922, 930 (9th Cir. 1993) quoting *Hanon*, 976 F.2d at 501), *cert. denied*, 115 S. Ct. 295 (1994).

Plaintiffs assert a number of misstatements and offer several press releases to support these assertions. AmPac issued a press release on April 29, 1992, which quotes AmPac President Fred Gibson as stating, "product development is proceeding on a fast track basis, and product testing of Halotron I has been extensive and successful." Plaintiff's Exhibit 50. Another press release issued July 28, 1992, states in part:

> Our Halotron project is also making excellent progress. A series of demonstrations, to be conducted by the U.S. Navy with the participation of other military departments and government agencies, is now scheduled for August. . . . We are confident that the demonstrations as planned will yield excellent results.
>
> Halotron is designed to replace ozone depleting halons in critical fire fighting applications on a worldwide basis. We expect our Halotron business

> will shortly be a major contributor to future revenues and profits.

Plaintiffs' Exhibit 64. Plaintiffs then offer a press release issued on October 26, 1992, which contains Gibson's description of the military's testing of Halotron, stating, "[f]rom the company's perspective, we believe that these tests were successful in all respects, conforming to the results of prior testing by the company and independent research institutes in the United States and in Europe." Plaintiffs' Exhibit 77. These representations were repeated verbatim in a press release dated November 2, 1992 announcing AmPac's results for the fiscal year ending September 30, 1992. Plaintiffs' Exhibit 80. Plaintiffs finally offer a press release dated December 8, 1992, which quotes Fred Gibson as follows:

> We are pleased with the U.S. Navy's test results. While there is not yet a product order, the completion of the evaluation was another critical step in our quest to get Halotron I and subsequent Halotron products on the market. A Navy halon program replacement review is scheduled in early 1993 in which Halotron I will be identified as a suitable replacement for halon 1211.

Plaintiffs' Exhibit 92.

Plaintiffs also offer various statements taken from Form 10-K for the year ending September 30, 1992, filed with the SEC on December 18, 1992 and stating, "Halotron has applications as a fire suppression agent for military, commercial and industrial uses" and "Halotron I, the first phase of Halotron, has been extensively and successfully tested." Plaintiffs' Exhibit 97. AmPac's Annual Report states that "Halotron appears to be the only current product meeting all the rigorous criteria for replacement of Halon 1211 in streaming and certain limited flooding applications." Plaintiffs' Exhibit 98. Plaintiffs offer other statements as well. *See* Plaintiffs' Exhibits 103, 111, 114, 117, and 213.

Plaintiffs also produce a number of reports that indicate that Halotron was not an effective halon replacement. Among these is a April 14, 1992 analysis prepared by the military and provided to AmPac.[6] *See* Plaintiffs' Exhibit 207. That report raises questions concerning the efficiency of Halotron compared to other replacement agents as well as the integrity of the data AmPac provided to the military. It further criticizes the presentation AmPac made to the military. *See id.*

The items that Plaintiffs present may lead a reasonable fact-finder to infer that AmPac was aware of the problems with Halotron but nonetheless made the above bullish statements and others regarding that product. The Court finds that there exists a genuine issue of material fact as to whether AmPac was aware of undisclosed facts "tending to seriously undermine the statement's accuracy," *see Hanon*, 976 F.2d at 501; *In re Wells Fargo Securities Litigation*, 12 F.3d at 930, and thus there is a genuine issue of material fact as to whether the statements are misstatements actionable under the securities laws.

B. Bespeaks Caution Doctrine

Defendants next assert that the statements made by AmPac during the relevant period clearly "bespeak caution" and are not actionable. For the "bespeaks caution" doctrine to insulate a defendant's materially false and misleading statements, (1) the language must be precise and specifically tailored to disclose the specific risks alleged to have been misrepresented; and (2) the so-called "cautionary language" must be analyzed in the context of information known to the market at the time of the disclosure. *Worlds of Wonder*, 35 F.3d at 1413.

Defendants assert that AmPac warned that "there can be no assurance that . . . a competitor or competitors will not develop fire suppression agents with comparable or superior qualities," and that "there can be no assurance, either as to

---

[6] Plaintiffs' Exhibit 207 is the subject of a pending Motion in Limine (# 114) filed by Defendants.

timing or ultimate outcome, of [the] process [for regulatory approval]." *See* Defendants' Exhibits 21 and 22. The Court finds this language broad and nonspecific.

Defendants offer several disclosures made by AmPac and other sources indicating that the investment community at least had some general knowledge of the risks of Halotron. *See, e.g.,* Defendants' Exhibit 40 ("there is no guarantee that initial Halotron I production will meet the demanding standards of the marketplace"); Defendants' Exhibit 41 ("Failure of Halotron I to capture market share could . . . result in a sharp decline in American Pacific's stock price"). However, there is at least a jury question as to whether the very problems and conditions Defendants stated may occur were already occurring. *See, e.g., Kaplan*, 49 F.3d at 1374 ("[w]e need not apply the [bespeaks caution] doctrine in this case . . . While the statement that no assurance can be given that the clinical trials ultimately will be successful might 'bespeak caution' as to the future success of clinical trials . . . at least a jury question remains whether it neutralized Medstone's statement that its System already had been used successfully and was thus competitive"). Accordingly, the Court finds the "bespeaks caution" doctrine inapplicable in this case.

C. Analysts' Opinions

Defendants assert that they cannot be held liable for those statements that were in fact made by securities analysts. To impose liability upon Defendants for statements made by securities analysts, Plaintiffs must prove that Defendants (1) "adopted" the statements; and (2) knew that the analysts' statements "were unreasonable when made and failed to disclose their unreasonableness to investors." *In re Caere Corporate Sec. Litig.*, 837 F. Supp. 1054, 1059 (N.D. Cal. 1993).

Plaintiffs offer the deposition testimony of Willard Brown, an analyst with Dean Witter, as well as the deposition testimony of Keys and Gibson. This testimony indicates that AmPac officers were involved in the creation of the reports and worked with the analysts in writing the reports. *See, e.g.*, Brown Deposition, pp. 46-48, 89-90, 92-93; Keys Deposition,

58-60; Gibson III Deposition, 23-24. The Court finds that a genuine issue of material fact exists as to whether the Defendants adopted the statements of the analysts. Moreover, as discussed *supra*, there is a genuine issue of fact as to whether the statements were material misstatements or "unreasonable when made." The Court will therefore deny Defendants' Motion for Summary Judgment with regard to the claims regarding Halotron.

V. Outside Directors' Secondary Liability

A. Aiding and Abetting

In their Consolidated Amended Class Action Complaint ("Complaint") (# 14), filed August 27, 1993, Plaintiffs allege that the Outside Directors and other individual defendants are secondarily liable under § 10(b) of the 1934 Act under a theory of aiding and abetting. *See* Complaint (# 14), ¶ 16 ("[e]ach of the Individual Defendants herein aided and abetted and rendered substantial assistance in the wrongs complained of herein"); *see also* Complaint (# 14), Count I (Violations of Section 10(b) and 20(a) of the 1934 Act and SEC Rule 10b-5), ¶ 70 [e]ach of the Individual Defendants is liable as a direct participant in and as an aider and abettor of the wrongs complained of herein"). The Outside Directors now seek summary judgement on claims based on aiding and abetting under § 10(b) of the 1934 Act and Rule 10b-5.

The United States Supreme Court has unequivocally stated that no private cause of action exists under § 10(b) against persons who aid and abet primary violations. *Central Bank, N.A. v. First Interstate Bank*, 114 S. Ct. 1439, 1458 (1994); *see also In re Cypress Semiconductor Sec. Litig.*, 891 F. Supp. 1369, 1381 (N.D. Cal. 1995) ("The Supreme Court in *Central Bank* . . . held "[t]here is no aiding and abetting liability under Rule 10b-5"); *In re Syntex Corp. Sec. Litig.*, 855 F. Supp. 1086, 1098 (N.D. Cal. 1994) ("[t]here is no private right of action under § 10(b) for aiding and abetting"). Plaintiffs cannot maintain their causes of action under § 10(b) of the 1934 Act and Rule 10b-5 against the Outside Directors under a theory of aiding and abetting. *Central Bank*, 114 S. Ct. at 1458.

Moreover, the Ninth Circuit has extended the rationale in *Central Bank* to bar causes of action against individual defendants for conspiracy under § 10(b) of the 1934 Act. *Epstein v. MCA*, 50 F.3d 644, 649 n.7 (9th Cir. 1995) ("We reject [plaintiff's] attempt to avoid Central Bank's restrictions on private aiding and abetting actions by using the label 'conspiracy'"). Plaintiffs cannot maintain their causes of action under § 10(b) of the 1934 Act and Rule 10b-5 against the Outside Directors under a theory of conspiracy. *Epstein*, 50 F.3d at 649 n.7.

D. Controlling Persons

In their Complaint (# 14), Plaintiffs also allege that the Outside Defendants are liable as "controlling persons." *See* Complaint (# 14), ¶ 15 ("[t]he Individual Defendants . . . by reason of their senior management positions and/or their membership on the Board of Directors of American Pacific, were . . . 'controlling persons'"); *see also* Complaint (# 14), Count I, ¶ 70 ("[t]he Individual Defendants, because of their positions and control and authority as principal executive officers and/or directors of American Pacific were able to and did, directly or indirectly, control the content of various financial reports, statements and press releases of American Pacific"). The Outside Directors also seek summary judgment on claims based on controlling-person liability.

Section 20(a) of the 1934 Act imposes joint and several liability on "controlling persons."[7] 15 U.S.C. § 78t. To

---

[7] Section 20(a) of the 1934 Act states as follows:

> (a) Joint and several liability; good faith defense. Every person who, directly or indirectly, controls any person liable under any provision of this title or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action. 15 U.S.C. § 78t(a).

establish liability as a "controlling person," Plaintiffs must show (1) that "the individual defendants had the power to control or influence [the securities violator];" and (2) that "the individual defendants were culpable participants in [the securities violator's] alleged illegal activity." *Wool v. Tandem Computers Inc.*, 818 F.2d 1433, 1440 (9th Cir. 1987) (emphasis omitted). Corporate directors are not automatically liable as controlling persons. *Id.* at 1441; *Burgess v. Premier Corp.*, 727 F.2d 826, 832 (9th Cir. 1984). Instead, Plaintiffs must establish that the corporate directors actually participated or exerted influence over the activities which are claimed to violate the securities laws. *Burgess*, 727 F.2d at 832.

Absent cognizable claims under Rule 10b-5, a § 20(a) claim alleging controlling person liability must fail as a matter of law. *In re VeriFone Sec. Litig.*, 11 F.3d 865, 872 (9th Cir. 1993); *In re Syntex Corp. Sec. Litig.*, 855 F. Supp. 1086, 1098 (N.D. Cal. 1994). Because the Court will grant summary judgment in favor of the Defendants with regard to the Rule 10b-5 claims alleging misstatements and omissions regarding ammonium perchlorate, the Court must grant summary judgment in favor of the Outside Directors on those § 20(a) claims as well. *In re VeriFone Sec. Litig.*, 11 F.3d at 872.

With regard to the Halotron claims, Plaintiff fails to establish that the outside directors were actual participants or exerted influence over the securities violators. Plaintiffs assert that the directors are liable since they signed the form 10-K reports and prospectuses filed with the SEC. However, the mere signing of forms filed with the SEC is not enough to impose controlling-person liability on an outside director. *See In re Gupta*, 1994 WL 748988, Fed. Sec. L. Rep. (CCH) 98612 (N.D. Cal. 1994) (citing cases). Accordingly, the Court will grant summary judgment in favor of the outside directors with regard to the Halotron claims.

IT IS THEREFORE ORDERED THAT the Outside Directors' Motion for Summary Judgment (# 79) is GRANTED;

IT IS FURTHER ORDERED THAT the Defendants' Motion for Summary Judgment (# 80) is GRANTED to the extent that it seeks summary judgment on those claims of violations of §§ 10(b) and 20(a) of the 1934 Act and Rule 10b-5 as well as § 11(a) of the 1933 Act with regard to the alleged misstatements regarding ammonium perchlorate; but DENIED in all other respects.

DATED: November 27, 1995

/s/ Philip M. Pro
PHILIP M. PRO
United States District Judge

UNITED STATES DISTRICT COURT

***** DISTRICT OF NEVADA

RECEIVED
AND FILED

In Re AMERICAN
SECURITIES LITIGATION,

JUDGMENT IN
A CIVIL CASE

This Document Relates to:

CV-S-93-576-PMP(LRL)

ALL ACTIONS.

X **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered it's verdict.

__ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

JUDGMENT IS ENTERED in favor of Defendant, American Pacific Securities, and against Plaintiffs on Plaintiffs' Class Action Complaint.

January 17, 1996
Date

LANCE S. WILSON
Clerk

/s/ Illegible
(By) Deputy Clerk

ENTERED AND SERVED

JAN 23 1996

CLERK, U.S. DISTRICT COURT DISTRICT OF NEVADA

BY /s/ Illegible **DEPUTY**

(2)

FILED
DEC 30 1997

No. 97-916

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

LESLIE ABROMSON, et al.,

Petitioners,

vs.

AMERICAN PACIFIC CORPORATION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

STEVE MORRIS
KRISTINA PICKERING
SCHRECK & MORRIS
1200 Bank of America Plaza
300 South Fourth Street
Las Vegas, Nevada 89101
(702) 474-9400

FRANK ROTHMAN
Counsel of Record
WARREN L. ETTINGER
MICHAEL RIPS
DAVID S. SHUKAN
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
300 South Grand Avenue
Los Angeles, California 90071
(213) 687-5000

Attorneys for Respondents

14 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	3
I. THERE IS NO CONFLICT IN THE HOLDINGS IN THIS CASE AND IN *POMMER*. BOTH DECISIONS REACH CONSISTENT RESULTS BASED UPON THE APPLICATION OF THE SAME LAW TO DIFFERENT FACTS	5
II. THERE IS NO COMPELLING REASON, NOR IS THERE AN IMPORTANT QUESTION OF FEDERAL LAW, THAT WOULD JUSTIFY THE GRANTING OF A WRIT OF CERTIORARI	6
III. THE NINTH CIRCUIT PROPERLY GRANTED SUMMARY JUDGMENT	7
IV. THE NINTH CIRCUIT PROPERLY DISREGARDED THE MARKET REACTION TO THE DISCLOSURE OF THE THIOKOL LAWSUIT	9
V. THE NINTH CIRCUIT PROPERLY APPLIED THE BALANCING TEST SET FORTH IN *BASIC* TO REJECT PETITIONERS' APPEAL	10
CONCLUSION	11

TABLE OF AUTHORITIES

Cases:	Page
Abromson v. American Pacific Corp., 114 F.3d 898 (9th Cir.), *petition for cert. filed*, No. 97-916, 66 U.S.L.W. 3418 (U.S. Dec. 2, 1997)	8, 10
Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972)	9
Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)	7
Basic Inc. v. Levinson, 485 U.S. 224 (1988)	9-10
Graver Tank & Manufacturing Co. v. Linde Air Products Co., 336 U.S. 271 (1949)	4
Pommer v. Medtest Corp., 961 F.2d 620 (7th Cir. 1992)	3, 5-6, 9
Statutes:	
Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737	10
Other Authorities:	
Sup. Ct. R. 10	4, 6

No. 97-916

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

LESLIE ABROMSON, et al.,

Petitioners,

vs.

AMERICAN PACIFIC CORPORATION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In May of 1988 an explosion and fire destroyed the southern Nevada production facilities of the predecessor of WECCO, a subsidiary of AmPac[1]. At the time, the company was one of only two manufacturers of ammonium perchlorate ("AP"), an oxidizing agent used in the aerospace and national

[1] AmPac is the acronym for American Pacific Corporation. WECCO is the acronym for Western Electrical Corporation. AmPac is used herein to refer to both entities.

defense industries. AmPac's principal customer for AP was Thiokol, the prime contractor for NASA, which used AP for the Space Shuttle.

Their desire to have two sources of AP prompted NASA and the Department of Defense ("DoD") to persuade AmPac to construct a new facility to produce AP. At the behest of NASA, WECCO entered into a series of agreements (hereinafter, the "W-T Agreements") which obligated WECCO to construct the facility from private financing provided by Security Pacific Bank.[2]

The W-T Agreements stipulated that the borrowed money and all interest charges would be repaid from funds generated by a surcharge on all sales of AP by WECCO. Thiokol was obligated to purchase an amount sufficient to enable WECCO to make the loan payments. The Federal Government agreed to reimburse Thiokol through NASA's purchases from them.

The W-T Agreements called for the bank loan to be repaid during the course of purchases by Thiokol of not less than 140 million pounds of AP over a period of seven years, at a rate of not less than 20 million pounds a year.

Under the terms of the loan agreement with Security Pacific Bank only WECCO was permitted to prepay the $92 million loan.

Prior to and during the class period, AmPac made numerous public statements to the effect that Thiokol was "obligated" to assure WECCO's sale of AP for the seven year period, that these sales were "assured," and that the W-T Agreements would "insulate" AmPac from competition in the AP market. These statements were included in AmPac's annual 10-K reports for 1991 and 1992, as well as the prospectus for the April 15, 1992 stock offering.

---

[2] Security Pacific Bank was subsequently replaced by Seattle First National Bank; however herein the loan will be referred to as the "Security Pacific Bank Loan."

During 1991 and 1992, NASA spoke to AmPac about paying off the loan from Security Pacific in fewer than seven years. AmPac also discussed the subject with Thiokol. In its 1991 10-K AmPac indicated the possibility of an early payoff.

During the discussions the parties disagreed as to whether a prepayment of the loan would terminate Thiokol's obligation to purchase AP from AmPac. AmPac's position was that only WECCO could prepay the loan and that WECCO would only do so if it were placed in a financial position that was the same or better than its position under the W-T Agreements. Because these preconditions were not met, WECCO refused to agree to prepay the Loan and the W-T Agreements remained in effect, with the parties continuing to perform in accordance with their obligations.

On June 11, 1993 Thiokol filed suit in Utah state court against AmPac seeking a judicial declaration that the complete repayment of the Security Pacific Bank Loan would terminate Thiokol's obligation to make further purchases of AP from AmPac. In its complaint Thiokol falsely alleged that AmPac had already agreed to early repayment of the loan. Such an agreement simply did not exist, and there was no evidence whatever that it did. Both the trial court and the Ninth Circuit so found.

Thiokol subsequently dismissed its lawsuit. Upon public disclosure of Thiokol's lawsuit, the price of AmPac's stock dropped precipitously.

REASONS FOR DENYING THE WRIT

The Petition for Writ of Certiorari should be denied because the Ninth Circuit's decision in this case does not place it in direct conflict with the Seventh Circuit's holding in *Pommer v Medtest Corp.*, 961 F.2d 620 (7th Cir. 1992); the Ninth Circuit's decision in this case is not a departure from standard judicial practice so as to call for intervention by the United States Supreme Court; and this case does not involve an important question of federal law that should be decided by the Supreme Court. Finally, the decisions of the Courts below

were correct. In all respects, the District Court's ruling was a straightforward application of the summary judgment standard to a record that did not contain any material evidentiary conflict.

A petition for writ of certiorari to the Supreme Court may only be granted by the Court upon a showing of "compelling reasons." Sup. Ct. R. 10. Other than in exceptional circumstances, the Supreme Court has limited the granting of the writ, in cases arising in the federal system, to the following categories: **I.** decisions of federal courts of appeal that conflict with other federal courts of appeal on the same important matter, or that are such a departure from standard judicial practice as to call for the Court's intervention; **II.** decisions of federal courts on an "important question of federal law" that (1) has not been, but should be, decided by the Supreme Court or, (2) has been decided in a way that conflicts with the decisions of the Supreme Court. *See* Sup. Ct. R. 10.

Rule 10 of the Rules of the Supreme Court clearly states that petitions based on an asserted error of facts or on claimed misapplication of a rule of law will "rarely [be] granted." From this the Court has adopted a correlative rule -- the "two courts doctrine" -- which holds that the Supreme Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949).

The Petition in this case is plainly deficient in that it fails to satisfy any one of the categories set forth above, and, more particularly, violates the "two courts doctrine." The entire Petition, as will be discussed, is little more than an attempt to persuade this Court to review asserted mistakes of fact that were concurred in by both the District Court and Court of Appeals.

I. THERE IS NO CONFLICT IN THE HOLDINGS IN THIS CASE AND IN *POMMER*. BOTH DECISIONS REACH CONSISTENT RESULTS BASED UPON THE APPLICATION OF THE SAME LAW TO DIFFERENT FACTS

Eager for a writ, Petitioners simply manufacture a conflict between the Ninth Circuit's decision below and the Seventh Circuit's decision in *Pommer v. Medtest Corp.*, 961 F.2d 620 (7th Cir. 1992). The decisions do not conflict.

The Ninth Circuit and Seventh Circuit -- confronted with factual and evidentiary records that were wholly dissimilar -- came to different conclusions regarding the materiality of the alleged misrepresentations. The two Circuits are not in disagreement over the relevant legal standard or its application. Put simply, different facts produced different results, hardly an unusual development and certainly not one that remotely justifies a writ of certiorari.

The plaintiff in *Pommer* had purchased an ownership interest in the defendant company based on the representations that the company had obtained a valuable patent on a certain process and that the sale of the company at a favorable price was imminent. *Pommer*, 961 F.2d at 622. Neither representation was true at the time it was made.

The case went to the jury, which found in favor of the plaintiffs. The trial judge overturned the verdict, holding, among other things, that the misrepresentation regarding the patent was immaterial. The Seventh Circuit found that the jury was justified in ruling for the plaintiff and would have been justified in finding that the misrepresentation was material.

The Seventh Circuit, not surprisingly, held that a statement that is both material and false at the time it is made does not become immaterial owing to later developments (*i.e.*, the issuance of a patent). *Id.* at 623. *Pommer* has no application to this case. First, the uncontroverted evidence established that

AmPac never made a misleading statement regarding the W-T Agreements, and subsequent events only confirmed the truthfulness of AmPac's representations.

Second, the Seventh Circuit in *Pommer* balanced the possible economic impact of having a patent denied (a patent that would have been the corporate defendant's sole asset) against a 20% chance of that denial occurring. On the other hand, the Ninth Circuit balanced the possible economic impact of prepayment of the Loan against a "virtually zero" possibility of that occurring. In *Pommer* there was a substantial probability of economic injury; in this case the uncontroverted evidence established that there was no probability of economic injury that was attributable to anything done by AmPac.

What Petitioners really object to is the Ninth Circuit's application of the law to the facts with which Petitioners must live. Under the law correctly applied by the Ninth Circuit and under this Court's Rules, the Supreme Court should deny certiorari. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or *the misapplication of a properly stated rule of law.*") (emphasis added).

Absent a conflict between the Ninth and Seventh Circuits on the same or similar facts, and given the entirely consistent application of the same rule of law to those facts, Petitioner's argument for granting the requested writ falls far short of sufficient grounds for its issuance.

II. THERE IS NO COMPELLING REASON, NOR IS THERE AN IMPORTANT QUESTION OF FEDERAL LAW, THAT WOULD JUSTIFY THE GRANTING OF A WRIT OF CERTIORARI

In seeking a writ of certiorari, it is incumbent upon the Petitioners to demonstrate the necessity of action on the part of the Court. This standard might be satisfied if Petitioners had demonstrated that an important question of federal law has been decided by the courts below in a way that conflicts with

prior Supreme Court decisions, or that there is such an important question raised by this case that it should be decided by the Court. Petitioners here have entirely failed to make any such showing. An examination of the three questions presented in the Petition demonstrates that Petitioners have only the narrowest of issues, and that none of these issues provide a basis for the granting of a writ of certiorari.

III. THE NINTH CIRCUIT PROPERLY GRANTED SUMMARY JUDGMENT

Petitioners argue that the Ninth Circuit, in the context of reviewing the correctness of the District Court's granting AmPac summary judgment, usurped the role of the jury by weighing the evidence in the case and then making a finding on the ultimate issue of fact -- namely, the materiality of AmPac's decision not to disclose its discussions with Thiokol and the government. (Pet. at 11.) This, Petitioners argue, violates the Supreme Court's decision in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

Petitioners' argument misstates the record and what was done by the District Court and affirmed by the Court of Appeals. Each court reviewed the entirety of the record to determine whether there was a "genuine issue of material fact" to present to a jury. Each concluded there was no issue of fact as to the materiality of AmPac's failure to disclose its discussions with Thiokol about a wholly hypothetical prepayment that was not agreed to and was entirely under AmPac's control.

The District Court and Ninth Circuit concluded that the "evidence" proffered by Petitioners was nonexistent and that Petitioners had mischaracterized the underlying facts of the case in an effort to create an impression that there was credible evidence on the issue of the materiality of AmPac's failure to disclose the Thiokol discussions. Neither the District Court nor the Ninth Circuit "balanced" evidence on the ultimate issue of fact in the case, because there was no evidence to balance.

Petitioners proffer two pieces of evidence that they allege establish an issue of fact on the materiality of AmPac's failure to disclose the nature of its discussions with Thiokol and the government: (1) a letter from Thiokol's outside counsel simply accepting, without discussion or factual support, Thiokol's false assertion that AmPac had agreed to prepayment of the loan; and (2) the drop in the market price of AmPac's stock when information regarding the "dispute" between WECCO and Thiokol was disclosed. (Pet. at 11.) Neither piece of evidence is probative.

Both Courts below found that AmPac never agreed to repayment of the loan and that there was absolutely no evidence to the contrary. Thiokol's outside counsel expressed no basis for his opinion that AmPac had agreed to prepayment. In a footnote he recited that he "understand(s) that WECCO and the bank have agreed to full satisfaction of the loan obligations in 1993 . . . ." (ER 899.) There is no indication in the record as to the basis or source of this "understanding." A genuine issue of material fact does not and cannot arise in the absence of admissible evidence. Thiokol's counsel was not part of the discussions between AmPac and Thiokol. At best Thiokol's counsel may have been relying on information from an undisclosed third party who was never identified. The unsubstantiated recital of this "understanding" clearly was inadmissible hearsay and had no probative value.

As to the fall in the market price of AmPac's stock, the courts below found that the price had indeed fallen, but not in response to the disclosure of discussions between AmPac, Thiokol and the government. The Courts below properly found that the price fell in response to the public disclosure of Thiokol's false and baseless complaint. *Abromson v. American Pac. Corp.*, 114 F 3d 898, 901, 903 (9th Cir.), *petition for cert. filed*, No. 97-916, 66 U.S.L.W. 3418 (U.S. Dec. 2, 1997). For this reason, the drop in the price of AmPac's stock was of no evidentiary significance to the courts below.

What Petitioners object to in the opinions below is the considered conclusion of two courts that the "facts" argued by

Petitioners were entirely without support in the record. Petitioners now seek to have this Court overturn that determination made by both Courts below. This Court has adopted a rule that precludes a writ of certiorari based on alleged error of facts when both lower courts are in agreement as to those facts. For this reason the writ must be denied.

IV. THE NINTH CIRCUIT PROPERLY DISREGARDED THE MARKET REACTION TO THE DISCLOSURE OF THE THIOKOL LAW SUIT

Petitioners contend that the Ninth Circuit contravened this Court's holdings in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988) and *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972) by ignoring the market reaction to the disclosure of the Thiokol law suit against AmPac. According to Petitioners, *Basic Inc.* and *Affiliated Ute Citizens* require that a court take into consideration the market reaction to the disclosure of the truth about an alleged misrepresentation or omission in determining its materiality.

Petitioners mischaracterize the holding of the Ninth Circuit. The Ninth Circuit did not hold that, as a matter of law, market reactions are never relevant to the issue of materiality. Rather, the Ninth Circuit held that the facts of this particular case did not support the contention that the market price declined in response to the disclosure of the truth regarding the discussions between Thiokol, AmPac and the government.[3]

The Ninth Circuit rejected the relevance of the drop in the price of AmPac stock based on a finding that the stock price fell as a result of false information contained in the Thiokol complaint (*i.e.*, the assertion that AmPac had agreed to prepayment of the loan) and not as a result of the disclosure of

---

[3] "The truth (or falsity) of defendants' statement, and their materiality, must be assessed at the time the statements are made, and not in the light of hindsight." *Pommer v. Medtest Corp.*, 961 F.2d 620, 625 (7th Cir. 1992).

the truth concerning prior discussions between Thiokol, AmPac and the government regarding the W-T Agreements.

V. THE NINTH CIRCUIT PROPERLY APPLIED THE BALANCING TEST SET FORTH IN *BASIC* TO REJECT PETITIONERS' APPEAL

Petitioners contend that the District Court, with the blessing of the Court of Appeals, deprived them of their right to have the jury determine "materiality" as set forth in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). (Pet. at 16.) To make such a determination, the magnitude of possible loss is weighed against the probability that the loss will occur. *Id.* at 238. The Ninth Circuit, however, affirmed summary judgment only after concluding that there was *no probability* that AmPac would suffer economic injury from a prepayment of the Loan. *Abromson*, 114 F.3d at 902-03. The reason for this result is straightforward and unassailable: there was no evidence anywhere in the record that AmPac would have even considered prepayment of the Loan unless it was placed in an economic position that was equal to or better than its position prior to prepayment. *Id.* at 903. With the probability of economic loss from prepayment at "virtually zero," there was nothing to weigh on one side of the *Basic Inc.* scale. Consequently, summary judgment was warranted and plainly correct. *Abromson*, 114 F.3d at 903.

Petitioners are seeking from this Court the extraordinary decision that the issue of materiality is *never* appropriate for summary judgment, a ruling that would mean, *a fortiorari*, that all securities fraud cases, however frivolous, would go the jury. No court has so held, and such a suggestion is contrary to recent developments in the securities law, including the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737. Petitioners' assertions would require this Court to overlook these two dispositive facts: (1) AmPac *never* consented to prepayment; and (2) AmPac repeatedly asserted it would consider prepayment *only* on the condition that it would not sustain any loss.

CONCLUSION

For the reasons set forth herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

FRANK ROTHMAN
Counsel of Record
WARREN L. ETTINGER
MICHAEL RIPS
DAVID S. SHUKAN
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

STEVE MORRIS
KRISTINA PICKERING
SCHRECK & MORRIS
1200 Bank of Ameica Plaza
300 South Fourth Street
Las Vegas, Nevada 59101
(702) 474-9400